(9) No. 98-1299-CSY Title: New York, Petitioner
v.
Michael Hill

Docketed: February 16, 1999 Court: Court of Appeals of New York

Entry	Date	Proceedings and Orders
	Feb 16 1999	Petition for writ of certiorari filed. (Response due March 18, 1999)
	Feb 26 1999	Waiver of right of respondent Michael Hill to respond filed.
	Mar 3 1999	DISTRIBUTED. March 19, 1999
	Mar 16 1999	Response requested.
	Apr 15 1999	Brief of respondent Michael Hill in opposition filed.
	Apr 15 1999	Motion of respondent for leave to proceed in forma pauperis filed.
	Apr 27 1999	REDISTRIBUTED. May 13, 1999
	Apr 28 1999	Reply brief of petitioner State of New York filed.
	May 17 1999	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	May 17 1999	Petition GRANTED. SET FOR ARGUMENT November 2, 1999. **********
	Jun 3 1999	Motion of respondent for appointment of counsel filed.
	Jun 7 1999	DISTRIBUTED. June 10, 1999 (Page 16)
	Jun 10 1999	Order extending time to file brief of petitioner on the merits until July 19, 1999.
	Jun 14 1999	Motion for appointment of counsel GRANTED and it is ordered that Edward J. Nowak, Esquire, of Rochester, New York, is appointed to serve as counsel for the respondent in this case.
	Jul 16 1999	Joint appendix filed.
	Jul 16 1999	Brief of petitioner New York filed.
	Jul 19 1999	Brief amicus curiae of United states filed.
	Jul 29 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 10 1999	Brief of respondent Michael Hill filed.
	Sep 2 1999	Record filed.
	Sep 9 1999	Reply brief of petitioner New York filed.
	Sep 10 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 1 1999	CIRCULATED.
	Nov 2 1999	ARGUED.

No. _____

In The

Supreme Court of the United States

October Term, 1998

THE STATE OF NEW YORK,

Petitioner,

vs.

MICHAEL HILL,

Respondent.

On Petition For Writ of Certiorari to the
New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

HOWARD R. RELIN
District Attorney of Monroe County
Attorney for Petitioner
Suite 832, Ebenezer Watts Building
47 South Fitzhugh Street
Rochester, New York 14614
(716) 428-5680

Of Counsel:
Robert Mastrocola,
Assistant District Attorney

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(2809)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

4118

QUESTION PRESENTED

Does a defendant's express agreement to a trial date beyond the 180-day period required by the Interstate Agreement on Detainers constitute a waiver of his right to trial within such period?

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JURISDICTION

The judgment of the New York Court of Appeals was entered on November 18, 1998. The jurisdiction of this Court is invoked under 28 USC §1257(a):

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATUTES INVOLVED

Interstate Agreement on Detainers - NY Criminal Procedure Law §580.20 (McKinney 1995) (set out in full in Appendix at page A-17) The Interstate Agreement on Detainers (IAD) is a congressionally-sanctioned interstate compact within Art I, §10 of the United States Constitution (Cuyler v Adams, 449 US 433 [1981]). The federal enactment of the IAD is at 18 USC App 2.

STATEMENT OF FACTS

Petitioner asks this Court to review an order/judgment of the New York Court of Appeals reversing an order of the New York Supreme Court, Appellate Division, Fourth Department and dismissing the murder indictment against respondent.

This appeal stems from an incident which occurred in the Rochester, New York suburb of Gates on New Year's Eve 1992 in which respondent and three companions robbed and shot to death Michael Weeks at a motel. (The codefendants Earl Williams, Jeffrey Tobias and Dearco Hill were similarly convicted at separate trials.) Respondent was incarcerated on a criminal conviction in Ohio when he was brought to New York to face these charges in May 1994. Respondent had been advised of the New York detainer and initiated the process for his return to New York pursuant to Article III of the Interstate Agreement on Detainers (IAD) (NY Criminal Procedure Law §580.20 [Appendix, p A-17]). Following pretrial motions and hearings the court, on January 9, 1995, set the matter for trial on May 1, 1995 with the express agreement of both the People and respondent, as reflected in the following colloquy:

> MR. PROSPERI [the prosecutor]: Your Honor, Mr. Huether from our office is engaged in a trial today. He told me that the Court was to set a trial date today. I believe the Court may have preliminarily discussed a May 1st date. And Mr. Huether says that would fit in his calendar.
>
> THE COURT: How is that with the defense

counsel?
MR. SCANLAN: That will be fine, Your Honor.

Just a few days before trial then respondent brought a motion to dismiss the indictment pursuant to the IAD. He contended that he had not been brought to trial within 180 days of his request for disposition of the charges under the Agreement. The People opposed dismissal, contending that there were a number of excludable periods such that the time limit was not violated. While the parties debated whether various periods of time were excludable, the court ultimately concluded that the dispositive time period was from January 9, 1995 (when, as noted, a trial date was set [for May 1, 1995]) to April 17, 1995 when respondent brought his dismissal motion (the court issued its written decision on the motion on May 2, 1995, the day before trial actually began). (Thereafter on appeal both sides would agree that this was the dispositive time period.) The court ultimately denied the motion in a written, published decision (People v Reid, 164 Misc2d 1032, 627 NYS2d 234 [NY Co Ct (Monroe Co) 1995]) (A-11). (Respondent was indicted as "Michael Hill a/k/a Dwain Reid"; the trial court captioned the matter with these names reversed but the appellate courts used the name "Michael Hill" only.) The court concluded that respondent had waived his right to trial within the 180-day period by expressly participating in setting the trial date beyond this period. The court noted that at the time the trial date was set the 180-day period had not expired and that the trial could have been held within this period if respondent so desired. Respondent was subsequently convicted, following a jury trial, of murder in the second degree and robbery in the first degree and sentenced on June 8, 1995 to concurrent, indeterminate terms of incarceration of 25 years to life on the

murder conviction and 8 1/3 to 25 years on the robbery conviction.

On appeal respondent raised the sole issue of whether the trial court erred in declining to dismiss the indictment for lack of a timely trial under the IAD and on November 19, 1997 the New York Supreme Court, Appellate Division, Fourth Department unanimously affirmed for the reasons stated in the decision of the trial court (People v Hill, 224 AD2d 927, 668 NYS2d 126, 693 NE2d 755 [NY App Div (4th Dept) 1997]) (A-9-10).

On further appeal (by permission) then the New York Court of Appeals on November 18, 1998 unanimously reversed the order of the Appellate Division and dismissed the indictment against respondent, concluding that respondent's concurrence in the later trial date did not constitute a waiver of his speedy trial rights under the IAD (People v Hill, 92 NY2d 406, 1998 WL 796865 [NY 1998]) (A-1).

ARGUMENT

This Court should grant review herein because the decision of the New York Court of Appeals addresses an important issue regarding interpretation/application of federal law - the Interstate Agreement on Detainers - which has not been but should be settled by this Court, and also because the decision directly conflicts with decisions on the same issue from the high courts of other states.

The IAD, as an interstate compact, is in essence a federal statute and thus its construction is a matter of federal law; this Court has itself addressed the IAD on occasion (e.g., Reed v Farley, 512 US 339 [1994]; Fex v Michigan, 507 US 43 [1992]; Carchman v Nash, 473 US 716 [1985]; Cuyler v Adams, 449 US 433 [1981]).

The narrow yet important issue presented by this case is whether a defendant's express participation in setting and thus agreement to a trial date beyond the statutorily-required 180-day period under the IAD constitutes a waiver of his right to be tried within such period. The time of trial is the core component of the IAD and obviously nothing more directly impacts such than a meeting of the court and the parties for the very purpose of setting a trial date. Here, although defense counsel's (and the prosecutor's) input as to the selection of a trial date was expressly sought by the court and counsel affirmatively agreed to a post-180-day date, the New York Court of Appeals held that this was "mere concurrence in the suggested date" which did not constitute an "affirmative request" for a trial beyond the statutory period and thus could not be deemed waiver. With all due respect to that Court, such reasoning defies common sense and indeed conflicts with reasoning employed by other state high courts as well as federal appellate courts.

Even assuming that the proper test for determining if a

waiver occurred is, as the Court of Appeals stated, whether there was an affirmative request for treatment that is contrary to or inconsistent with a defendant's IAD speedy trial rights, surely a defendant's express involvement in the setting of a trial date must be considered "affirmative" conduct. Here the court actively invited defense counsel's participation in determining a mutually agreeable trial date. Counsel had every opportunity for input into the trial date determination; it was not forced upon him by the court. The Court of Appeals decision suggests that if respondent had been first to "propose" the trial date then such would have amounted to an affirmative request and thus a waiver, but because the court spoke first there could be no waiver, even though it was clear that respondent had every opportunity to reject the proposed date and to suggest an alternative date. This simply cannot be; it is illogical and serves no purpose but to promote gamesmanship by, e.g., encouraging attorneys to wait to see who is "first" to mention a trial date. It should be readily apparent that the outcome of an entire case – conviction or instead dismissal (and indeed this was a murder case) – should not turn on a point so fine that it amounts to nothing more than hypertechnical semantics.

In Moon v State (258 Ga 748, 375 SE2d 442 [Ga 1988]) the Georgia Supreme Court held that a defendant's agreement to a trial date beyond the prescribed period constitutes a waiver under the IAD. In State v Greenwood (665 NE2d 579 [Ind 1996]) the Indiana Supreme Court held that a defendant's failure to object to a trial date which was beyond the 180-day period constitutes a waiver under the IAD. The Indiana Supreme Court had applied the same rule in an earlier case, Reed v State (491 NE2d 182 [Ind 1986]), a case which was ultimately considered by this Court on federal habeas review (Reed v Farley, 512 US 339, supra). The issue addressed by this Court was the availability of habeas review of IAD claims -

the Court found such generally unavailable - and thus it did not directly consider the substantive underlying issue of waiver vis-a-vis a defendant's role in the setting of a trial date. Instead, Justice Ginsburg, with the Chief Justice and Justice O'Connor joining, merely found that because defendant had obscured the IAD's time prescription and avoided clear objection until the clock had run there was no cause for collateral review since there was merely an unwitting judicial slip, without aggravating circumstances, which did not rise to the level of a fundamental defect resulting in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure (id., at 348-349). The other Justices of this Court, however, were of the view that Justice Ginsburg either did or may have addressed waiver (id., at 356 [Scalia and Thomas, Justices, concurring in part and concurring in the judgment], and at 370-371 [Blackmum, Stevens, Kennedy and Souter, Justices, dissenting]), but they themselves did not decide the issue now squarely presented by the instant case.

Other state high courts, in contrast, have held that a defendant's "mere silence" in the face of the court's setting of an untimely trial date does not constitute waiver (e.g., State v Dolbeare, 140 NH 84, 663 A2d 85 [NH 1995]; Roberson v Commonwealth, 913 SW2d 310 [Ky 1994]). Here of course there was hardly "mere silence" on defense counsel's part yet the New York Court of Appeals effectively treated the matter as if there were. This problem of seemingly inconsistent interpretation and application of the concept of waiver in connection with setting a trial date is perhaps most pointedly evidenced by People v Allen (744 P2d 73 [Colo 1987]), a Colorado Supreme Court decision relied upon by the New York Court of Appeals (see, A-7). As the dissenting Justices in Allen pointed out, the majority there held that a waiver can be evidenced by affirmative conduct and that a defendant may

waive his speedy trial rights by freely acquiescing in a trial date beyond the statutory period, yet although this is exactly what happened in the case (twice, no less) the majority refused to find waiver. In the words of the dissent,

> "A defendant should not have the right to participate in the setting of a trial date beyond the speedy trial period and then claim a violation of the speedy trial provision"
> (People v Allen, supra, at 79 [Vollack, J., dissenting]; see also, State v Dolbeare, 140 NH 84, 87, 663 A2d 85, 87, supra [Thayer, J. and Brock, C.J., dissenting]).

This is all the more so in a case such as the instant one where it was respondent who initiated the process for his return for trial under the IAD (pursuant to Article III); this was not an Article IV case where the prosecutor initiates the return.

Furthermore, it is not even entirely clear that the proper test for waiver is that of an "affirmative request" for treatment contrary to the IAD. Some federal appellate courts (to which the state courts often look for guidance on this issue) talk about waiver being an affirmative request for treatment contrary to the IAD (e.g., Yellen v Cooper, 828 F2d 1471 [10th Cir 1987]; Brown v Wolff, 706 F2d 902 [9th Cir 1983]; United States v Odom, 674 F2d 228 [4th Cir 1982], cert denied 457 US 1125 [1982]; United States v Eaddy, 595 F2d 341 [6th Cir 1979]) while others talk about it being any action that was expressly or impliedly inconsistent with the provisions of the IAD (United States v Lawson, 736 F2d 835 [2nd Cir 1984]). However, in the case often cited for the "affirmative request" test, United States v Eaddy (supra), the court tied such test to the condition that defendant be unaware of his rights under the IAD; here as previously noted respondent was aware of his right to a speedy trial because he was the one who initiated his return to New York under Article III of the IAD for the very purpose of

obtaining a speedy trial. Moreover, even a court applying the "affirmative request" test has found that a defendant's "agreement" to continuances of trial amounts to action "contrary" to the IAD's speedy trial provisions and thus waiver (Brown v Wolf, 706 F2d 902, 907, supra). However, regardless of the terms in which the proper "test" for waiver is described, surely the concept of waiver must be deemed to encompass a defendant's express participation in and agreement to the setting of the trial date beyond the prescribed period.

It is imperative that this Court address this issue and resolve the analytical conflict among jurisdictions, since at present the exact same factual scenario could have drastically different results - a defendant could, e.g., be convicted of murder and sentenced to death or instead have the case dismissed and go free - depending solely on the jurisdiction in which the matter arises because those jurisdictions construe the very same law differently. Indeed, as noted there is conflict on this issue not only among different jurisdictions but even among individual judges of the same courts of individual jurisdictions. The whole purpose of the IAD is to ensure prompt trials and thus its key provisions are those establishing actual time periods for trial (180 days under Article III, 120 days under Article IV), and nothing more directly impacts the actual time of trial than the setting of the trial date. The issue herein thus goes to the very heart of the IAD - an interstate compact whose uniformity of application in this regard is essential but currently lacking. "The IAD's purpose . . . can be effectuated only by nationally uniform interpretation" (Reed v Farley, 512 US 339, 348, supra). It is therefore respectfully requested that review be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

HOWARD R. RELIN
Monroe County District Attorney
Attorney for Petitioner
Ebenezer Watts Building
Suite 832
Rochester, NY 14614

Of Counsel:

Robert Mastrocola,
Assistant District Attorney

APPENDIX

State of New York
Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent, v MICHAEL HILL, Appellant.

Argued October 15, 1998; decided 18, 1998

Edward J. Nowak, Public Defender of Monroe County, Rochester (*Stephen J. Bird* of counsel), for appellant.

Howard R. Relin, District Attorney of Monroe County, Rochester (*Robert Mastrocola* of counsel), for respondent.

Chief Judge KAYE.

The core issue before us on this appeal is whether defendant, in concurring in the court's suggested trial date set beyond the 180-day period mandated by the Interstate Agreement on Detainers (IAD) (CPL 580.20), waived his right to a speedy trial under that statute. Concluding that no waiver was effected, we grant defendant's motion to dismiss the indictment for violation of the statute's speedy trial provisions.

In December 1993, Monroe County law enforcement officials lodged a detainer[1] against defendant, then incarcerated

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1 A detainer is ' "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another

at the Lorain Correctional Institution in Grafton, Ohio. The detainer notified the Ohio authorities that defendant was wanted for committing murder in the second degree and robbery in the first degree in Monroe County. After learning of the detainer, defendant exercised his rights under Article III of the IAD and formally requested a final disposition of the untried New York charges. Defendant's request was delivered to the Monroe county court and prosecutor on January 10, 1994, triggering IAD speedy trial provisions requiring defendant to be tried within 180 days.

Defendant was formally indicted on March 11, 1994. Two months later, in May, defendant filed several pre-trial motions. The court ruled on those motions in December 1994 and shortly thereafter, on January 9, 1995, the prosecutor and defense counsel appeared in court to fix a trial date. Addressing the Judge, the prosecutor noted that it was his understanding that "the Court may have preliminarily discussed a May 1st [trial] date." The prosecutor informed the Judge that May 1 was a convenient date for the People to begin trial. The court then inquired: "How is that with the defense counsel?" Defendant's attorney respondent: "That will be fine, Your Honor."

On April 17, 1995 – 468 days after Monroe County authorities received defendant's notice of request for final disposition – defendant moved to dismiss the indictment,

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jurisdiction" ' (*United States v Mauro*, 436 US 340, 359). The term has also been defined as "a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer" (Council of State Governments, Suggested State Legislation Program for 1957, Agreement on Detainers, at 74).

arguing that the prosecution had failed to bring him to trial within the 180-day statutory speedy trial period. Denying that motion, the trial court held that defendant had waived his speedy trial rights by concurring in the May 1 trial date, which was beyond the statutory period (164 Misc2d 1032). Defendant was subsequently convicted, after a jury trial, of murder in the second degree and robbery in the first degree. The Appellate Division affirmed. We now reverse.

Discussion

Prior to adoption of the IAD in 1957,[2] there were no formal procedures governing detainers. A law enforcement official interested in prosecuting an individual incarcerated in another jurisdiction would simply file a detainer with prison authorities in that jurisdiction advising them that charges were pending and requesting notification when release of the prisoner was imminent. Once a detainer was filed, neither the requesting nor the custodial authority was legally bound to act up it (*see generally*, Note, *The Interrelationship Between Habeas Corpus and Prosequendum, the Interstate Agreement on Detainers, and the Speedy Trial Act of 1974: United States*

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2 First suggested in 1948 by various correctional organizations, the IAD was developed over a considerable period of time. The specific language ultimately included in New York's Criminal Procedure Law was drafted by an interstate conference on correctional problems held in 1956 under the joint auspices of the American Correctional Association, the National Probation and Parole Association, the Council of State Governments and the Joint Legislative Committee on Interstate Cooperation (*see*, 1957 NY Legis Doc No. 46, Appendix III-A, at 178). Over the years, the majority of jurisdictions, including the Federal government in 1970, have adopted the IAD.

v Mauro, 40 U Pitt L Rev 285, 289 [1979]; Note, *The Interstate Agreement on Detainers: Defining the Federal Role*, 31 Vand L Rev 1017, 1021 [1978]). Indeed, as a practical matter it was virtually impossible for the State lodging the detainer to obtain custody of the inmate prior to completion of sentence in the confining State; the necessary procedures were cumbersome and expensive, and thus seldom invoked (Fried, *The Interstate Agreement on Detainers and the Federal Government*, 6 Hofstra L Rev 493, 497 [1978]). Moreover, a prisoner's demand to be tried pursuant to a detainer on charges outstanding in a jurisdiction other than the State of incarceration had no legal effect because there were no procedures to compel transfer to the State that had filed the detainer (*see*, Council of State Governments, Suggested State Legislation Program for 1957, Agreement on Detainers, at 78).

Detainers lodged under the old system, therefore, inevitably gave rise to speedy trial problems.[3] By the time the

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3 Other problems were identified as well. For example, the lodging of a detainer against an inmate presented a threat of further imprisonment for an unknown period and obscured the probable date of a prisoner's return to society. That was seen as impeding the ability of prison officials to develop an effective institutional treatment plan for that inmate (*see*, Letter of Deputy Commr of NY St Dept of Correction, Bill Jacket, L 1957, ch 524). Additionally, concern was expressed that detainees, considered higher security risks, were denied full access to rehabilitation programs, educational opportunities, vocational training and recreational privileges (*see*, Note, *The Interrelationship Between Habeas Corpus and Prosequendum, the Interstate Agreement on Detainers, and the Speedy Trial Act of 1974: United States v Mauro*, 40 U Pitt L Rev 285, 289-290).

prisoner's first sentence was served, memories had faded, events had lost their perspective, witnesses had disappeared and evidence had been lost or destroyed (*see, e.g., Dickey v Florida*, 398 US 30). Designed to change this delay-ridden system, the IAD's state purpose is to encourage the orderly, expeditious disposition of untried accusatory instruments by providing cooperative procedures for securing the transfer of defendants incarcerated in other States (CPL 580.20, art I).

In furtherance of its objective, the IAD specifies extradition procedures, fixes speedy trial periods and mandates severe penalties for noncompliance. Under article III, which applies here, a prisoner may request final disposition of untried charges, thereby initiating transfer to the jurisdiction where the charges are pending (CPL 580.20, art III[a]). Once the prosecuting officer and the appropriate court receive notice of such a request, the prisoner must be brought to trial within 180 days. That period gives the prosecutor "ample time to proceed * * * yet it is short enough to give the prisoner ground to expect that his status can be determined within a measurable and reasonable period" (1957 NY Legis Doc No. 46, Appendix III-A, at 177-178).

Where a defendant is not brought to trial within the statutory period, the IAD requires that an indictment be dismissed with prejudice (CPL 580.20, art V[c]; *see, United States v Ford*, 550 F2d 732, 743-744 [2d Cir], *affd sub nom. United States v Mauro*, 436 US 340). Although the penalty of dismissal is by its terms mandatory, the IAD provides two exceptions: the request for speedy disposition of the charges is void if the prisoner escapes from custody, and the court may grant reasonable and necessary continuances, but only for good cause shown in open court with the prisoner or his attorney present (CPL 580.20, art III[a], [f]; art IV[c]). Thus, where there is a period during which the court hears and decides

defense motions, that period will be excluded from the speedy trial time on the ground that such delay constitutes a necessary or reasonable continuance (*see*, *People v Torres*, 60 NY2d 119, 127-128). In the present case, the period from May 18, 1994 (when the case was adjourned for defense motions) to December 5, 1994 (when the court rendered a decision on those motions) was excludable on that basis (CPL 580.20, art III[a]).

A closer question, however, is whether the 55-day delay from January 9, 1995 (when the parties appeared in court to fix a trial date) to April 17, 1995 (when defendant filed his motion to dismiss the indictment) should also be excluded from calculation of the 180-day speedy trial period. The problem arises because, as noted above, defendant concurred in the May 1 trial date suggested by the court and agreed to by the prosecution, even though that date was beyond the statutory period. We conclude, however, that defense counsel's concurrence did not constitute a waiver of defendant's statutory right to a speedy trial.

Under the IAD, defendants have a single responsibility: to notify prison officials of their request to be brought to trial on the pending out-of-State charges (CPL 580.20, art III[b]). Otherwise, the burden of complying with statutory requirements falls upon the respective officials involved. Thus, ensuring that a defendant is brought to trial within the mandated speedy trial period is the responsibility of prosecutors and courts, not defendants (*see*, *e.g.*, *United States v Ford*, 550 F2d 732, 743, *supra* [Trial Judge has responsibility to reassign cases to assure defendants their right to a speedy trial]).

From the statutory language and objectives it follows that the IAD does not impose an obligation on defendants to alert the prosecution or the court to their IAD speedy trial rights or to object to treatment that is inconsistent with those rights (*Brown v Wolff*, 706 F2d 902, 907 [9th Cir]). Indeed, to impose

such an obligation on defendants would be to shift the burden of compliance with the IAD from State officials, where the Legislature very deliberately placed it. Such a shift would diminish the statute's effectiveness and enforceability (*see*, *United States v Eaddy*, 595 F2d 341, 345 [6th Cir]).

Speedy trial rights guaranteed by the IAD may, of course, be waived by a defendant. Generally, such waiver may be accomplished explicitly or by an affirmative request for treatment that is contrary to or inconsistent with those speedy trial rights (*see*, *United States v Odom*, 674 F2d 228, 230 [4th Cir], *cert denied* 457 US 1125 [waiver by defendant's request for an adjournment]; *United States v Ford*, 550 F2d 732, *supra* [waiver by defendant's request to be returned to Massachusetts prior to his trial]; *United States v Scallion*, 548 F2d 1168 [5th Cir], *cert denied* 436 US 943 [defendant estopped from asserting an IAD violation because return to New York was at his own request in order to be present for a parole hearing]; *see also*, *People v Torres*, 60 NY2d, at 125, *supra*; *see also*, *People v Prosser*, 309 NY 353, 358).

In *United States v Eaddy* (595 F2d 341, *supra*), for example, defense counsel indicated that he "did not care" where his client was held pending trial on Federal charges. Thereafter, in contravention of the IAD's anti-shuttling provisions, authorities transferred defendant back and forth between Federal and State prisons (*id.*, at 343). The court held that defendant did not waive his IAD rights by failing to state a preference as to his place of incarceration (*see also*, *People v Allen*, 744 P2d 73 [Colo.] [defendant's agreement to trial dates set beyond statutory time period held insufficient to support a finding of waiver]).

Similarly, where, as here, the defendant simply concurred in a trial date proposed by the court and accepted by the prosecution, and that date fell outside the 180-day statutory

period, no waiver of his speedy trial rights was effected. Defendant's mere concurrence in the suggested date did not constitute an affirmative request for a trial date beyond the speedy trial period. Moreover, it is the burden of the prosecutor and the court to comply with the IAD's speedy trial requirements. Because defendant was not brought to trial within the 180-day period, the indictment must be dismissed in accordance with the mandate of IAD article V(c).

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to dismiss the indictment granted and the indictment dismissed.

Judges **BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY concur.**
Order reversed, etc.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1277

PRESENT: DENMAN, P.J., GREEN, WISNER, BALIO AND BOEHM, JJ.

PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MICHAEL HILL, APPELLANT.
Indictment No: 160/94

Michael Hill having appealed to this Court from the judgment of the Monroe County Court, entered in the Monroe County Clerk's office on June 8, 1995, and said appeal having been argued by Stephen Bird of counsel for appellant, Robert Mastrocola of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously affirmed for reasons stated in decision at Monroe County Court, Egan, J.

Entered: November 19, 1997 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1277. (Monroe Co.) – PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL HILL, APPELLANT. – Judgment unanimously affirmed for reasons stated in decision at Monroe County Court , Egan, J. (Appeal from Judgment of Monroe County Court, Egan, J. - Murder, 2nd Degree.) PRESENT: DENMAN, P.J., GREEN, WISNER, BALIO AND BOEHM, JJ. (Filed Nov. 19, 1997.)

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v DWAIN REID, Also Known as MICHAEL HILL, Defendant.

County Court, Monroe County, May 2, 1995

APPEARANCES OF COUNSEL

Edward J. Nowak, Public Defender of Monroe County (*Edward F. Scanlon* of counsel), for defendant. *Howard R. Relin, District Attorney* of Monroe County (*Gregory Huether* of counsel), for plaintiff.

OPINION OF THE COURT

DAVID D. EGAN, J.

Indictment No. 160, filed March 11, 1994, accuses defendant of one count of murder in the second degree and one count of robbery in the first degree. In a motion filed April 17, 1995, defendant moves to dismiss the indictment pursuant to the Interstate Agreement on Detainers (IAD). On April 24, 1995, the People filed answering papers opposing defendant's motion to dismiss.

The IAD, codified in CPL 580.20, is a compact among States that establishes the available methods of securing the attendance of defendants confined as prisoners in other States. Its purpose, as set forth in article I, is to encourage the expeditious and orderly disposition of untried indictments by providing cooperative procedures for the transfer of prisoners between States.

The statute sets forth two procedures for initiating the transfer of a prisoner. Under article III, the prisoner may initiate the transfer by making a request for "final disposition" of an untried indictment, information or complaint. Where this

procedure is used, the defendant must be brought to trial within 180 days of the request. A second procedure is authorized by article IV, which provides that the District Attorney in the State where the untried indictment, information or complaint is pending may initiate the transfer by presenting a written request for "temporary custody or availability" to the authorities of the State in which the prisoner is incarcerated. Where the District Attorney initiates the transfer, the defendant must be brought to trial within 120 days of his arrival in the receiving State.

The IAD mandates a dismissal of the indictment where the defendant is not brought to trial within the applicable statutory period. However, when calculating whether the defendant's rights under the IAD have been violated, the court must exclude certain delays which are not attributable to the People. The running of the time period is tolled when the court grants "any necessary or reasonable continuance" upon a showing of "good cause * * * in open court". (Art III [a]; art IV[c].) The running of the time is also tolled whenever the defendant is "unable to stand trial" as determined by the court (art VI). Finally, the facts in a particular case may warrant a finding that a delay is excludable because the defendant has abandoned, or waived, his rights under the IAD. (*People v Torres,* 60 NY2d 119, 124.)

The case before this court is governed by article III of the IAD. On December 30, 1993, while defendant was incarcerated as a sentenced prisoner in Grafton, Ohio, a detainer was lodged against him accusing him of having committed the crimes of murder in the second degree and robbery in the first degree in Monroe County, New York. On January 4, 1994, defendant signed a request for final disposition of the Monroe County charges. Pursuant to article III of the IAD, the People had 180 days from the date of defendant's request to bring him to trial. (*See*, art III[a]; *see*

also, People v Torres, supra, at 123; *People v C'Allah*, 100 AD2d 754.)

In this case, 468 days elapsed from January 4, 1994, the date defendant signed the request, to April 17, 1995, the date defendant filed his motion to dismiss. The court must now consider whether any of the delay is excludable. The following dates are relevant to that determination:

January 4, 1994	Defendant signs request for disposition
January 10, 1994	Request delivered to court and prosecutor
May 13, 1994	Defendant delivered to the Monroe County Jail
May 18, 1994	Defendant arraigned, case adjourned for defense motions
July 12, 1994	Defendant files motions
July 29, 1994	Motions argued, court orders pretrial hearings
August 19, 1994	Hearings commenced
October 12, 1994	Hearings completed
December 5, 1994	Court renders written decision
January 9, 1995	Trial scheduled for May 1, 1995
April 17, 1995	Defendant files motion to dismiss pursuant to IAD

The court finds that the entire 133-day delay from January 4, 1994, the date defendant requested disposition of the Monroe County charges, to May 18, 1994, the date defendant was arraigned in Monroe County Court, is chargeable to the People. There is no authority to support the People's contention that the delay attributable to the process necessary in returning a prisoner is excludable.

The entire delay from May 18, 1994, the date the matter was adjourned for defense motions, to December 5, 1994, the date the court rendered a decision on the motions, may properly be attributed to the filing and disposition of defense motions.

Consequently, the delay may be excluded as a "necessary or reasonable continuance" under article III and/or as a time that defendant "is unable to stand trial" under article VI. (*See, People v Torres, supra*, at 126-127; *People v Delaney*, 121 AD2d 650; *People v Chiofalo*, 73 AD2d 673.)

The 34-day delay from December 5, 1994 to January 9, 1995 is chargeable to the People. Notably, the People have advanced no reason which would justify the exclusion of this period. When combined with the earlier delays chargeable to the People, the time chargeable to the People from defendant's request for disposition to January 9 totals 167 days. This case turns, then, on whether the People are to be charged with the 55-day delay from January 9, 1995, the date the case was scheduled for trial, to April 17, 1995, the date defendant filed his motion to dismiss the indictment.

On January 9, 1995, the following colloquy took place:

"MR. PROPSPERI: Your honor, Mr. Huether from our office is engaged in a trial today. He told me that the Court was to set a trial date today. I believe the Court may have preliminarily discussed a May 1st date, and Mr. Huether says that would fit in his calendar.

"THE COURT: How is that with the defense counsel?

"MR. SCANLON: That will be fine, Your Honor."

The court finds that defendant waived his right to a trial within the 180-day period by concurring in the decision to set a trial date beyond the statutory period. The Court of Appeals has held that "[t]he facts in a particular instance may warrant a factual determination that the defendant has elected not to assert or has abandoned his rights under the Agreement on Detainers and has chosen to proceed to disposition with reference thereto" (*People v Torrres, supra*, at 124). Courts in

this State have found an abandonment, or waiver, of a defendant's rights under the IAD in myriad of circumstances (*see, Matter of Amiger v Long*, 101 AD2d 616; *People v Lambert*, 61 NY2d 978; *People v Gooden*, 151 AD2d 773; *People v Sacco*, 199 AD2d 288). Although the precise issue before this court has not been determined by a court in New York State, courts in other jurisdictions have held that a defendant who concurs in a decision to set a trial date beyond the statutory period waives his rights under the IAD. *People v Jones* (495 NW2d 159, 160-161, 197 Mich App 76 [1992]) merits quotation: "A waiver is established when a defendant, either expressly or impliedly, agrees or requests to be treated in a manner contrary to the terms of the IAD * * *. Valid waivers have been found where either the defendant or his attorney agree to a continuance or a later trial date * * * To avoid waiving any rights under the IAD, the defendant must generally object to those procedures or actions by the trial court that may infringe upon the protections afforded by the IAD * * * [c]onduct that is inconsistent with the IAD will be viewed as establishing a waiver of statutory rights."

Here, defendant, defense counsel and a representative from the District Attorney's office were present at the time the trial date was set. The court sought input from both attorneys with respect to the proposed trial date. (*Cf., People v Allen*, 744 P2d 73 [Colo 1987].) Had counsel raised an objection to the proposed trial date, the court was in a position to set the date within the 180-day statutory period. Defense counsel's explicit agreement to the trial date set beyond the 180-day statutory period constituted a waiver or abandonment of defendant's rights under the IAD. Consequently, the entire delay from January 9, 1995 to April 17, 1995 is excludable.

Finally, the delay from April 17, 1995 to the date of this decision is also excludable. Defendant's filing of a motion to

dismiss pursuant to the IAD tolls the statute (*United States v Dawn*, 900 F2d 1132, 1136 [7th Cir 1990]).

For the reasons stated above, the court concludes that the delay chargeable to the People does not exceed 180 days.

Accordingly, defendant's motion to dismiss the indictment is denied.

§580.20 Agreement on detainers

The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

TEXT OF THE AGREEMENT ON DETAINERS

The contracting states solemnly agree that:

ARTICLE I

The party states find that charges outstanding against a prisoner detainers based on untried indictment, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

ARTICLE III

(a) Whenever a person had entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer had been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commission of correction or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of correction or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of this body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he had lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or compliant shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the

sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons thereof.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall

enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner the appropriate authority in receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complain on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment,

information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untired indictments, informations or complaints which form the basis of the detainer or detainers of for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments,

informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as

to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

1. This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstances shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

2. The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, mean any court with criminal jurisdiction.

3. All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purposes.

4. Escape from custody while in another state pursuant to the agreement on detainers shall constitute an offense against the laws of this state to the same extent and degree as an escape

from the institution in which the prisoner was confined immediately prior to having been sent to another state pursuant to the provisions of the agreement on detainers and shall be punishable in the same manner as an escape from said institution.

5. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

6. The governor is hereby authorized and empowered to designate an administrator who shall perform the duties and functions and exercise the powers conferred upon such person by Article VII of the agreement on detainers.

7. In order to implement Article IV(a) of the agreement on detainers, and in furtherance of its purposes, the appropriate authorities having custody of the prisoner shall, promptly upon receipt of the officer's written request, notify the prisoner and the governor in writing that a request for temporary custody had been made and such notification shall describe the source and contents of said request. The authorities having custody of the prisoner shall also advise him in writing of his rights to counsel, to make representations to the governor within thirty days, and to contest the legality of his delivery.

(2)

No. 98-1299

IN THE

SUPREME COURT OF THE UNITED STATES

NEW YORK STATE – PETITIONER

VS.

MICHAEL HILL – RESPONDENT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent asks of leave to file the attached response brief to the State's petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[*] Respondent has previously been granted leave to proceed *in forma pauperis* in the following courts:

Monroe County Court, Monroe County, State of New York; Supreme Court, Appellate Division, Fourth Department, State of New York; New York Court of Appeals.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Edward John Nowak

Edward John Nowak, Esq.
Monroe County Public Defender

20 pp.

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Michael Hill, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$	$	$ 18:00	$ =
Self-employment	$ Gym worker	$ I AIN'T GOT NOE	$ =	$ =
Income from real property (such as rental income)	$ NONE	$ NONE	$ NONE	$ =
Interest and dividends	$ NONE	$ NONE	$ =	$ =
Gifts	$ NONE	$ NONE	$ =	$ =
Alimony	$ NONE	$ NONE	$ =	$ =
Child Support	$ NONE	$ NONE	$ =	$ =
Retirement (such as social security, pensions, annuities, insurance)	$ NONE	$ NONE	$ =	$ =
Disability (such as social security, insurance payments)	$ NONE	$ NONE	$ =	$ =
Unemployment payments	$ NONE	$ NONE	$ =	$ =
Public-assistance (such as welfare)	$ NONE	$ NONE	$ =	$ =
Other (specify):	$ NONE	$ NONE	$ =	$ =
Total monthly income:	$ 18:00	$	$ =	$ =

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
PRISON	LORAIN CORR INST 2075 S. NOV Belden RD GRAFTON, OHIO 44044	1-7-95	$ 18:00
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
I AIN'T GOT	NO WOMAN		$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
0	0	$ 0	$ 0
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value NONE

☐ Other real estate
Value NONE

☐ Motor Vehicle #1
Year, make & model NONE
Value

☐ Motor Vehicle #2
Year, make & model NONE
Value

☐ Other assets
Description I AIN'T GOT NO FORM OF ASSETS
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE	$ NONE	$ NONE
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
my Family	Turn Their	back on me

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
	I spend my entire pay on	
Rent or home-mortgage payment (include lot rented for mobile home)	$	$ Commissary
Are real estate taxes included? ☐ yes ☒ no		
Is property insurance included? ☐ yes ☒ no		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ NO	$ NO
Home maintenance (repairs and upkeep)	$ NO	$ NO
Food	$ 18.00	$ 0
Clothing	$ NO	$ NO
Laundry and dry-cleaning	$ 8 A MONTH	$
Medical and dental expenses	$ 3 A MONTH	$

Transportation (not including motor vehicle payments)	$ NO	$ =
Recreation, entertainment, newspapers, magazines, etc.	$ NO	$ =
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ NO	$ =
Life	$ NO	$ =
Health	$ NO	$ =
Motor Vehicle	$ NO	$ =
Other:	$ NO	$ =
Taxes (not deducted from wages or included in mortgage payments) (specify):	$ NO	$ =
Installment payments		
Motor Vehicle	$ NO	$ =
Credit card(s)	$ NO	$ =
Department store(s)	$ NO	$ =
Other:	$ NO	$ =
Alimony, maintenance, and support paid to others	$ NO	$ =
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ NO	$ =
Other (specify):	$ NO	$ =
Total monthly expenses:	$ NO	$ =

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ yes ☑ no If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ yes ☑ no

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ yes ☑ no

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

AT THIS POINT IN TIME I'm CURRENTLY INCARCERATED IN A STATE PRISON IN OHIO, AND I ONLY MAKE $18 dollors A MONTH. AND I HAVE TO buy food AND hygienes OUT OF THAT. I AIN'T GOT NO OTHER SOURCE OF INCOME COMING IN.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: MARCH 29, 1999

michael hill

(Signature)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

– No. 98-1299

THE STATE OF NEW YORK,
Petitioner,

v.

MICHAEL HILL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Michael Hill, through his counsel, Edward John Nowak, Esq., Monroe County Public Defender, Rochester, New York, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the New York Court of Appeals in this case. That opinion is reported at 92 N.Y.2d 406 (1998).

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REASONS WHY THE WRIT SHOULD BE DENIED

1. *The case at bar was decided by the New York Court of Appeals in a manner consistent with the uniform holdings of the federal circuit courts and those state courts that have reached the issue of waiver under the Interstate Agreement on Detainers (IAD).*

As set forth in detail in part (2) below, the New York Court of Appeals held that Mr. Hill's attorney did not waive Mr. Hill's IAD rights by responding, "[t]hat will be fine, Your Honor," to a court-proposed trial date outside of the IAD's prescribed time-period as counsel's response was but an acquiescence to the proposal and not an "express agreement," as that term is used in the context of IAD waivers. While the specific facts that give rise to the issue at bar are very unusual and not likely to often arise, made evident herein is the consistency with which the courts, both federal and state, interpret and apply the waiver provisions of the IAD. In fact, with the sole exception of the State of Indiana, all of the forty-eight states[1] and the District of Columbia which are signatories to the IAD, and all of the eleven federal circuits, have used the same standard for determining the issue of when a defendant has waived his IAD rights. Significantly, the precedents established by the federal circuit (and state) courts make easy the application of the law, as evidenced by the New York Court of Appeals's ready - and correct - application of the existing law to the unique facts presented by Mr. Hill's case.

Specifically, the federal courts of appeal have required that in order for a

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[1] Louisiana and Mississippi are not signatories to the Interstate Agreement on Detainers, a federal compact governed by federal law (see, Cuyler v. Adams, 449 U.S. 433 (1981)), which is codified in New York as Criminal Procedure Law § 580.20.

defendant to waive his rights under the IAD, (s)he must do so explicitly or by an act expressly or impliedly inconsistent with the provisions of the IAD. This test, while sometimes worded slightly differently (see, e.g, p. 7 of Petitioner's brief to this Court), results in fair and consistent holdings when strictly applied. To illustrate the cohesiveness and lack of confusion in the interpretation of the IAD and waivers under the compact by the federal courts of appeal, see, e.g.: U.S. v. Rossetti, 768 F.2d 12 (1st Cir., 1985); U.S. v. Ford, 550 F.2d 732 (2nd Cir., 1977); U.S. v. Palmer, 574 F.2d 164 (3rd Cir., 1978); U.S. v. Odom, 674 F.2d 228 (4th Cir., 1982); U.S. Scallion, 548 F.2d 1168 (5th Cir., 1977); U.S. v. Eaddy, 595 F.2d 341 (6th Cir., 1979); Webb v. Keohane, 804 F.2d 413 (7th Cir., 1986); Camp v. U.S., 587 F.2d 397 (8th Cir., 1978); Snyder v. Sumner, 960 F.2d 1448 (9th Cir., 1992); Yellen v. Cooper, 828 F.2d 1471 (10th Cir., 1987); U.S. v. Johnson, 713 F.2d 633 (11th Cir., 1983).

The seminal cases of U.S. v. Eaddy, 595 F.2d 341 (6th Cir., 1979), and U.S. v. Odom, 674 F.2d 228 (4th Cir., 1982), present excellent practical examples of the correct application of the federal waiver test to two fact scenarios that ultimately required opposite judicial determinations. In Odom, id., defense counsel requested a continuance as the psychiatric evaluation of his client was not yet complete. The court held that the defense had, therefore, waived its rights under the IAD by requesting an adjournment in its bests interests and inconsistent with the legislative intent of the IAD. In Eaddy, 595 F.2d 341, however, despite defense counsel's statement that he "did not care" where his client, a state prisoner, was held pending the federal charges (where transfer of the defendant back to state custody prior to his federal trial was directly contrary to articles III(a) and (d) and IV(c) and (e) of the IAD), the court held that

counsel's failure to state a preference as to his client's place of incarceration was not a waiver of his IAD rights. Id. at 345. The court held that to hold otherwise would "shift the burden of compliance with the Agreement away from the Government, where Congress placed it, onto the prisoner." Id. at 345. See also, State v. Dolbeare, 663 A.2d 85 (N.H., 1995) (defendant did not have to demand that the prosecutor and court comply with the IAD as long as he did not affirmatively request that they follow a procedure inconsistent with it). Accordingly, as exemplified by Eaddy, id., and Odom, 674 F.2d 228, the controlling federal case law establishes that delays, unless expressly requested by the defense, are chargeable to the defense *only* where they are to the *benefit* of the defendant.

The state courts which have considered the standard for waiver under the IAD have uniformly adopted the same standard in determining waiver as have the federal courts. See, e.g.: State v. Hill, 638 So.2d 1376 (Ala. Crim. App., 1993); Conway v. State, 707 P.2d 930 (Alaska Ct. App., 1985); State v. Burrus, 151 Ariz. 581 (1986); People v. Nitz, 219 Cal. App.3d 164 (1990); People v. Brown, 854 P.2d 1332 (Colo. Ct. App., 1993); Haigler v. U.S., 531 A.2d 1236 (D.C. Cir., 1987); State v. Edwards, 509 So.2d 1161 (Fla. Dist. Ct. App.,1987); Moon v. State, 258 Ga. 748 (1988); State v. Schmidt, 84 Hawai'i 191 (1997); People v. Laws, 200 Ill. App.3d 232 (1990); Kansas v. Maggard, 16 Kan. App.2d 743 (1992); Roberson v. Kentucky, 913 S.W.2d 310 (Ky., 1994); Bunting v. Md., 80 Md. App. 444 (1989); People v. Jones, 197 Mich. App. 76 (1993); Missouri v. Moore, 882 S.W.2d 253 (Mo. Ct. App., 1994); State v. Seadin, 181 Mont. 294 (1979); Snyder v. Nevada, 103 Nev. 275 (1987); State v. Dolbeare, 663 A.2d 85 (N.H., 1995); State v. Montoya, 119 N.M. 95 (1995); People v. Hill, 92 N.Y.2d 406

(1998); State v. Clarkson, 87 Or. App. 342 (1987); Commonwealth v. Thornhill, 411 Pa. Super. 382 (1992); State v. McKinley,148 Wisc.2d 952 (1989). Every other state that is a signatory to the IAD has addressed the compact in one context or another but have not had cause to reach the question of waiver presented herein.[2] The paucity of IAD cases in those states (and those which have addressed waiver) both underscores the cohesiveness in the acceptance by the states of federal precedent in IAD cases and the infrequency in which the issue of waiver in an IAD context arises.

Likewise, Mr. Hill's case is also entirely in accord with the federal circuit courts and those state courts which have reached the issue of waiver under the IAD. Indeed, it is only the State of Indiana that imposes, *sua sponte*, an objection requirement upon the defense (see, e.g., State v. Greenwood, 665 N.E.2d 579), a requirement that is in direct contravention of federal (and state) precedent. In Odom, 674 F.2d 228, for instance, the court specifically addressed the objection requirement as the defendant had requested a continuance based upon the Federal Speedy Trial Act (STA). The court held that an objection based on the IAD was necessary only where a defendant

[2] See, e.g, Finley v. State, 295 Ark. 357 (1988); State v. Braswell, 194 Conn. 297 (1984); State v. Davis, WL138993 (Del. Super., 1993); Sherman v. Idaho, 107 Idaho 869 (1984); Hickey v. Iowa, 349 N.W.2d 772 (Iowa Ct. App., 1984); State v. Watson, 657 A.2d 776 (Me., 1995); Commonwealth v. Fasano, 6 Ma. App. Ct. 325 (1978); State v. Fuller, 560 N.W.2d 97 (Minn. App., 1997); State v. Harper, 2 Neb. App. 220 (1978); State v. Miller, 277 N.J. Super. 122 (1994); State v. Dorsett, 344 S.E.2d 342 (N.C. Ct. App., 1986); State v. Moe, 581 N.W. 2d 468 (N.D., 1998); State v. Holt, 83 Ohio. App.3d 676 (1992); Gallimore v. State, 944 P.2d 939 (Okla. Crim. App., 1997); State v. Moosey, 504 A2d 1001 (R.I., 1986); State v. Holbrook, 260 S.E.2d 181 (S.C., 1979); State v. Goodroad, 521 N.W.2d 433 (S.D., 1994); State v. Hall, 976 S.W.2d 121 (Tenn., 1998); Schin v. Texas, 744 S.W.2d 370 (Tex. Crim. App., 1988); Buchanan v. Utah, 663 P.2d 70 (Utah, 1983); Godfrey v. Roessel, 136 Vt. 324 (1978); Valentine v. Commonwealth, 18 Va. App. 344 (1994); State v. Hott, 173 W.Va. 502 (1984); Knox v. State, 848 P.2d 1354 (Wyo., 1993).

asserts that compliance with the STA infringes upon his rights under the IAD in order that the court can be able to determine and record whether the "good cause" requirement for a continuance under the IAD was also satisfied. Id. at 231-232. Notably, the court in Odom, id., did not require the defense to register a contemporaneous objection and found the issue preserved where counsel first moved for dismissal pursuant to the IAD months after the continuance at issue was granted. The IAD places no affirmative obligation on the defendant to alert the court of his IAD rights; to preserve for appeal a violation of the IAD, a defendant need only raise the issue prior to or during trial. Brown v. Wolff, 706 F.2d 902, 907 (9th Cir., 1983); Eaddy, 595 F.2d at 346. Thus, it is Indiana that is aberrational, and the holding of the New York Court of Appeals in Mr. Hill's case that is directly in accord with all of the federal circuits and those state courts that have reached the waiver issue. Consequently, Respondent respectfully submits that the case at bar is not worthy of the granting of certiorari. See, Taylor v. U.S., 493 U.S. 906 (1989) (denial of certiorari correct where petition fails to identify any inter-Circuit conflict concerning the question presented).

2. *The decision below fails to raise the Question Presented in the petition.*

The sole Question Presented in Petitioner's brief (p. 1) is whether "a defendant's express agreement to a trial date beyond the 180-day period required by the Interstate Agreement on Detainers constitute[d] a waiver of his right to trial within such period?"

In this case, Petitioner misconstrues the question addressed by the New York Court of Appeals as that court did not decide whether a defendant's *express agreement* to a trial date beyond the time-frame mandated by the IAD constituted a waiver of defendant's IAD rights (as set forth above, that issue has been addressed without

conflict by the federal circuit courts). Moreover, the facts of record do not support a determination of the question presented by Petitioner to this Court.

Rather, as described by the New York Court of Appeals, Mr. Hill's attorney's act of acquiescing to the court's (and prosecutor's) proposed trial date did not constitute a waiver of Mr. Hill rights under the IAD. As the phrase "express agreement" is used in the context of IAD waivers, acquiescence or concurrence is not the same. Thus, the New York Court of Appeals rejected the argument presented again here by Petitioner and premised its holding on the finding that the words of Mr. Hill's counsel were not an express agreement but, instead, something considerably less, i.e., only a concurrence or acquiescence.[3]

As repeatedly stated in the opinion of the New York Court of Appeals, defense counsel simply concurred in the proposed trial date and that "mere concurrence in the suggested date does not constitute an affirmative request." See, Hill, 92 N.Y.2d at 410-412. The court below held that the mere acquiescence - or concurrence - in a court-proposed trial date is insufficient to waive a defendant's IAD rights for to hold otherwise would shift the burden of compliance with the Agreement away from the Government, where Congress placed it, onto the prisoner. See, e.g., Odom, 672 F.2d 1471; Eaddy, 595 F.2d at 345. And upon review of long-standing federal and state precedent (see part (1), above), nor does acquiescence or tacit concurrence equate with an express

[3] Moreover, at a time of increased concern of the lack of civility in the courtroom, a finding that counsel's respectful acquiescence to a court-proposed trial date constitutes a waiver of the substantive statutory rights of a client would have a chilling impact on the willingness of counsel to comport themselves in a polite manner. See, e.g., Standards Of Civility - A Lesson In Good Manners, 45 JAN FEDRLAW 2 (1998); Professionalism Starts On Local Level, 67 MAR JKSBA 16 (1998).

agreement under the IAD where no benefit accrues to the defendant. Only one case found by Respondent involved like facts - and was decided accordingly. See, People v. Allen, 744 P.2d 73 (Colo., 1987) (defense counsel's response of "fine" to court-proposed trial date deemed acquiescence and not a waiver of defendant's IAD rights as to rule otherwise would impermissibly shift the burden of compliance to the defendant).

Thus, the Question Presented by Petitioner was not the question addressed by the court below and is not presented by the case at bar. While the case at bar presented a rare fact pattern, the applicable law is clearly set forth by federal precedent and, as followed by the New York Court of Appeals in Mr. Hill's case, illustrates the straightforward disposition readily achieved by strict adherence to federal (and state) precedent.

3. *Conclusion.*

In summary, Petitioner's brief neither raises a question presented by the holding of the court below nor presents this Court with a question worthy of the granting of a writ of certiorari. The case at bar raised a question for which the controlling federal law (and existing state law) is consistently interpreted in uniform fashion. Indeed, the clarity of the existing law is underscored by the direct - and correct - application of the controlling law to the facts by the court below. Moreover, issues of waiver in IAD cases are rare and the facts in the case at bar so unique that the decision in the case at bar turned on its own facts and calls for no additional voice by this Court that would help illuminate an issue of nationwide significance or affect even a small number of other litigants.

CONCLUSION

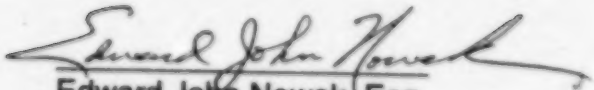
For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Edward John Nowak, Esq.
Monroe County Public Defender
10 N. Fitzhugh Street
Rochester, New York 14614
(716) 428-5210

Stephen John Bird, Esq.
Assistant Public Defender
10 N. Fitzhugh Street
Rochester, New York 14614
(716) 428-5416

Counsel for Respondent:



Edward John Nowak, Esq.
Monroe County Public Defender

No. 98-1299

In The

Supreme Court of the United States

October Term, 1998

THE STATE OF NEW YORK,

Petitioner,

vs.

MICHAEL HILL,

Respondent.

On Petition For Writ of Certiorari to the New York State Court of Appeals

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HOWARD R. RELIN
District Attorney of Monroe County
Attorney for Petitioner
Suite 832, Ebenezer Watts Building
47 South Fitzhugh Street
Rochester, New York 14614
(716) 428-5680

Of Counsel:
Robert Mastrocola,
Assistant District Attorney

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(2981)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

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Respondent's opposition to certiorari in this matter serves only to highlight the need for further review.

Respondent has submitted a brief in opposition to the petition for certiorari in this matter which purports to demonstrate why further review is unwarranted but which in reality only bolsters petitioner's position that such review is appropriate and indeed necessary.

Initially, respondent's claim that the issue presented by this case is not likely to arise often is belied by the sheer number of cases he cites in erroneously contending that the issue has been resolved consistently throughout the nation. Indeed, his claim that all of the states (save for one) and all federal circuits have uniformly applied the same standard for waiver under the IAD is undermined by the very authority he cites and in any event such claim does not address the precise issue here - whether, regardless of the terms in which the test for waiver is described, a defendant's express agreement to a proposed trial date constitutes waiver. At least four of the federal cases cited - United States v Johnson (713 F2d 633 [11th Cir 1983], cert denied sub nom. Watkins v United States, 465 US 1081 [1984]), Camp v United States (587 F2d 397 [8th Cir 1978]), United States v Palmer (574 F2d 164 [3rd Cir 1978], cert denied 437 US 907 [1978]) and United States v Scallion (548 F2d 1168 [5th Cir 1977], cert denied 436 US 943 [1978]) - do not address waiver in the context at issue here (instead dealing with when a defendant generally waives an IAD claim by failing to assert it in the trial court and/or appellate

court), and another case - United States v Rossetti (768 F2d 12 [1st Cir 1985]) - expressly suggests a potential conflict regarding the standard for determining waiver and apparently adopts a test rejected by other courts (id., at 19 n8; cf., e.g., Webb v Keohane, 804 F2d 413, 414-415 [7th Cir 1986]; United States v Odom, 674 F2d 228, 230 [4th Cir 1982], cert denied 457 US 1125 [1982] [cases also cited by respondent]).

Furthermore, respondent's contention that delays are chargeable to the defense, i.e., a waiver of IAD speedy trial rights occurs, only where such delays "benefit" the defense is a mischaracterization of the test(s) for waiver actually described in the case law (no court holds that such is a necessary component of the waiver standard). In any event, his implicit suggestion that the required benefit was absent here is wholly unsupported; there was nothing on the record at the time the trial date was discussed among the court and the parties indicating that respondent wanted an earlier date and/or that the time period between then and the agreed-upon date did not inure to respondent's benefit (by, e.g., at a minimum giving him more time to prepare for trial).

Respondent claims that the state courts which have addressed the matter have uniformly adopted the "same standard" as the federal courts, but the cases cited in support of this proposition again for the most part do not address the precise waiver issue presented here or else directly support petitioner's position and contradict the determination of the New York Court of Appeals herein (e.g., State v Schmidt, 84 Hawaii 191, 198-200, 932 P2d 328, 335-337 [Hawaii Ct App 1997]; People v Jones, 197 Mich App 76, 495 NW2d 159 [Mich Ct App 1992] [a case expressly relied upon by the trial court herein in the ruling that was eventually reversed by the Court of Appeals]). Respondent's claim that Indiana stands alone on the issue presented here is patently false as demonstrated by the above-cited cases and those cited in the petition for certiorari; other state courts (lower appellate courts

in the absence of high courts' discussion of the issue) have also adopted the position urged by petitioner (e.g., State v Harris, 49 Conn App 121, 141, 714 A2d 12, 21 [Conn App 1998]; State v Aukes, 192 Wis2d 338, 345, 531 NW2d 382, 385 [Wis Ct App 1995]).

In addition, respondent's contention that the question presented by the petition (i.e., as "framed") was not actually addressed by the court below is specious. Respondent's argument in this regard actually begs the question clearly presented: does a defendant's verbal assent to a proposed trial date constitute waiver regardless of how one "labels" or characterizes such assent. In any event, respondent's suggestion that there is some critical, definable difference between "agreement", "concurrence" and "acquiescence" in this regard would no doubt come as a surprise to anyone with a basic comprehension of the English language, not to mention publishers of dictionaries and thesauruses.

Finally, respondent's suggestion that his counsel's agreement to the trial date was motivated by concerns of "civility" and "politeness" (i.e., that the court "forced" the trial date on counsel, who dared not object lest he incur the court's wrath) is farcical; the reason for such agreement is irrelevant and in any event this claim is flatly refuted by the record and indeed false as a general proposition as it does not comport with the reality of criminal law practice in this community (and presumably elsewhere).

Thus defendant's arguments purporting to dispel or diminish the worthiness of this case for further review actually serve the opposite purpose and merely underscore that the issue presented herein is significant, recurring and the subject of sharp -

indeed irreconcilable-conflict among the various jurisdictions of this nation. We thus continue to urge that review be granted.

Respectfully submitted,

HOWARD R. RELIN
Monroe County District Attorney
Attorney for Petitioner
Ebenezer Watts Building
Suite 832
Rochester, NY 14614

Of Counsel:

Robert Mastrocola

Robert Mastrocola,
Assistant District Attorney

No. 98-1299

In The

Supreme Court of the United States

October Term, 1998

THE STATE OF NEW YORK,

Petitioner,

vs.

MICHAEL HILL,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

JOINT APPENDIX

HOWARD RELIN*
District Attorney of Monroe County
Suite 382, Ebenezer
Watts Building
47 South Fitzhugh Street
Rochester, New York 14614
(716) 428-5680
Of Counsel:
Robert Mastrocola,
Assistant District Attorney
Counsel for Petitioner

EDWARD JOHN NOWAK*
Monroe County Public
Defender
10 North Fitzhugh Street
Rochester, New York 14614
(716) 428-5210
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED FEBRUARY 16, 1999
CERTIORARI GRANTED MAY 17, 1999

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(3134)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

57pp

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CHRONOLOGICAL LIST OF IMPORTANT DATES

April 17, 1995	Respondent filed motion in Monroe County Court (New York) to dismiss indictment pursuant to Interstate Agreement on Detainers
April 24, 1995	Petitioner filed response to motion to dismiss indictment
May 2, 1995	Respondent filed reply to petitioner's response
May 2, 1995	Monroe County Court issued decision denying respondent's motion to dismiss indictment
June 8, 1995	Monroe County Court entered judgment of conviction and sentence against respondent
November 19, 1997	New York Supreme Court, Appellate Division, Fourth Department entered order affirming respondent's judgment
November 18, 1998	New York Court of Appeals entered order/judgment reversing Appellate Division order and dismissing indictment against respondent

February 16, 1999	Petitioner filed petition for writ of certiorari with United States Supreme Court
May 17, 1999	United States Supreme Court granted petition for writ of certiorari

[OHIO DEPT. OF REHABILITATION & CORRECTION]

Sec. 2963.30 ORC

AGREEMENT ON DETAINERS: FORM I

In duplicate. One copy of this Form, signed by the prisoner and the warden, should be retained by the warden. One copy, signed by the warden, should be retained by the prisoner.

NOTICE OF UNTRIED INDICTMENT, INFORMATION OR COMPLAINT AND OF RIGHT TO REQUEST DISPOSITION

Inmate: FOSTER, LEROY No. A282-660

Institution: Lorain Correctional Institution

Pursuant to the Agreement on Detainers, you are hereby informed that the following are the untried indictments, informations or complaints against you concerning which the undersigned has knowledge, and the source and contents of each:

MURDER F2, ROBB F1-GATES PD ROCHESTER NEW YORK

You are hereby further advised that by the provisions of said Agreement you have the right to request the appropriate prosecuting officer of the jurisdiction in which any such

(Continued on Next Page)

AGREEMENT ON DETAINERS: FORM I (Continued)

indictment, information or complaint is pending and the appropriate court that a final disposition be made thereof. You shall then be brought to trial within 180 days, unless extended pursuant to provisions of the Agreement, after you have caused to be delivered to said prosecuting officer and said court written notice of the place of your imprisonment and your said request, together with a certificate of the custodial authority as more fully set forth in said Agreement. However, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Your request for final disposition will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against you from the state to whose prosecuting official your request for final disposition is specifically directed. Your request will also be deemed to be waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein and a waiver of extradition to the state of trial to serve any sentence there imposed upon you after completion of your term of imprisonment in this state. Your request will also constitute a consent by you to the production of your body in any court where your presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which you are now confined.

Should you desire such a request for final disposition of any untried indictment, information or complaint, you are to

(Continued on Next Page)

AGREEMENT ON DETAINERS: FORM I (Continued)

notify the **RECORD OFFICE** of the institution in which you are confined.

You are also advised that under provisions of said Agreement the prosecuting officer of a jurisdiction in which any such indictment, information or complaint is pending may institute proceedings to obtain a final disposition thereof. In such event, you may oppose the request that you be delivered to such prosecuting officer or court. You may request the Governor of this state to disapprove any such request for your temporary custody, but you can not oppose delivery on the grounds that the Governor has not affirmatively consented to or ordered such delivery. You are also statutorily entitled to the procedural protections provided in state extradition laws.

DATED: **JANUARY 4, 1994**

s/Norm Rose (Acting Warden)(s/KMR)
(Warden - Superintendent - Director)

CUSTODIAL AUTHORITY

NAME: Terry J. Collins, Warden
INSTITUTION: Lorain Correctional Institution
ADDRESS: 2075 S. Avon Belden Road
CITY/STATE: Grafton, Ohio 44044
TELEPHONE NO.: (216) 748-1049

(Continued on Next Page)

AGREEMENT ON DETAINERS: FORM I (Continued)

RECEIVED

DATE: **JANUARY 4, 1994**

NAME OF INMATE: s/Leroy Foster No. A282-660
(signature)

WITNESS: _____ Date: March 19, 1993
(signature)

Debbie Miller, Administrative Assistant II
(Name and Title)

[OHIO DEPT. OF REHABILITATION & CORRECTION]

AGREEMENT ON DETAINERS: FORM II

Six copies, if only one jurisdiction within the state involved has an indictment, information or complaint pending. Additional copies will be necessary for prosecuting officials and clerks of court if detainers have been lodged by other jurisdictions within the state involved. One copy should be retained by the prisoner; one copy should be retained by the warden. Signed copies must be sent to the Agreement Administrators of the sending and receiving states, the prosecuting official in the jurisdiction which placed the detainer, and the clerk of the court which has jurisdiction over the matter. The copies for the prosecuting officials and the court must be transmitted by certified or registered mail, return receipt requested.

INMATE'S NOTICE OF PLACE OF IMPRISONMENT AND REQUEST FOR DISPOSITION OF INDICTMENTS, INFORMATIONS OR COMPLAINTS

TO: HOWARD R. RELIN, Prosecuting Officer, NEW YORK
(jurisdiction)
GATES PD - MONROE COUNTY, Court NEW YORK
(jurisdiction)

And to all other prosecuting officers and courts of jurisdictions listed below from which indictments, informations or complaints are pending.

(Continued on Next Page)

DRC 3125 (Rev. 6/88)

AGREEMENT ON DETAINERS: FORM II (Continued)

You are hereby notified that the undersigned is now imprisoned in the **Lorain Correctional Institution** at **Grafton, Ohio** and I hereby request that a final disposition be made of the following indictments, informations or complaints now pending against me:

MURDER F2, ROBB F1-GATES PD ROCHESTER NEW YORK

Failure to take action in accordance with the Agreement on Detainers, to which your state is committed by law, will result in the invalidation of the indictments, informations or complaints.

I hereby agree that this request will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against me from your state. I also agree that this request shall be deemed to be my waiver of extradition with respect to any charge or proceedings contemplated hereby or included herein, and a waiver of extradition to your state to serve any sentence there imposed upon me, after completion of my term of imprisonment in this state. I also agree that this request shall constitute a consent by me to the production of my body in any court where my presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which I now am confined.

If jurisdiction over this matter is properly in another agency, court or officer, please designate the proper agency, court or officer and return this form to sender.

(Continued on Next Page)

AGREEMENT ON DETAINERS: FORM II (Continued)

The required Certificate of Inmate Status and Offer of Temporary Custody are attached.

Dated: **JANUARY 4, 1994** s/Leroy Foster
(Inmate's Signature)

(Typed): FOSTER, LEROY A282-660
(Inmate's Name and Number)

The inmate must indicate below whether he has counsel or wishes the court to appoint counsel for purposes of any proceedings preliminary to trial which may take place before his delivery to the jurisdiction in which the indictment, information or complaint is pending. Failure to list the name and address of counsel will be construed to indicate the inmate's consent to the appointment of counsel by the appropriate court in the receiving state.

A. My counsel is _____
(Name of Counsel)

Whose address is _____
(Street, City and State)

_X_ B. I request the court to appoint counsel.

I (have read the above) (have had the above read and explained to me), and I understand its meaning and agree thereto.

(Continued on Next Page)

AGREEMENT ON DETAINERS: FORM II (Continued)

Dated: **JANUARY 4, 1994**

s/Leroy Foster
(Inmate's Signature)

(Typed): FOSTER, LEROY A282-660
(Inmate's Name and Number)

Dated: **JANUARY 4, 1994**

WITNESS: s/K. Rinaldi
(Signature)

Debbie Miller, Administrative Assistant II

[OHIO DEPT. OF REHABILITATION & CORRECTION]

AGREEMENT ON DETAINERS: FORM III

In the case of an inmate's request for disposition under Article III, copies of this form should be attached to all copies of Form II. In the case of a request initiated by a prosecutor under Article IV, a copy of this form should be sent to the prosecutor upon receipt by the warden of Form V. Copies also should be sent to all other prosecutors in the same state who have lodged detainers against the inmate. A copy may be given to the inmate.

CERTIFICATE OF INMATE STATUS

RE: FOSTER, LEROY (Inmate) A282-660 (Number)

Lorain Correctional Institution (Institution) **Grafton, Ohio** (Location)

The (custodial authority) hereby certifies:

1. The term of imprisonment under which the prisoner, above named, is being held: 3 AIG CS/W 1 CC/W 5AI-25 YRS
2. The time already served: 22 DAYS, 1 MONTH
3. Time remaining to be served: 9 MONTHS, 5 YEARS 1ST HEARING
4. The amount of good time earned: N/A

(Continued on Next Page)

DRC 3124 (Rev. 6/88)

AGREEMENT ON DETAINERS: FORM III (Continued)

5. The date of parole eligibility of the inmate: 10/99
6. The decisions of the Parole Board relating to the prisoner: (If additional space is need use reverse side.) N/A
7. Maximum expiration date under present sentence: -4/-4/2021
8. Detainers currently on file against this inmate from your state are as follows: MURDER F2, ROBB F1-GATES PD ROCHESTER NEW YORK

Dated: **JANUARY 4, 1994**

s/Norm Rose (Acting Warden)(s/KMR)
(Warden - Superintendent - Director)

CUSTODIAL AUTHORITY

NAME: Terry J. Collins, Warden
INSTITUTION: Lorain Correctional Institution
ADDRESS: 2075 S. Avon Belden Road
CITY/STATE: Grafton, Ohio 44044
TELEPHONE NO.: (216) 748-1049

[OHIO DEPT. OF REHABILITATION & CORRECTION]

Sec. 2963.30 ORC

AGREEMENT ON DETAINERS: FORM IV

In the case of an inmate's request for disposition under Article III, copies of this form should be attached to all copies of Form II. In the case of a request initiated by a prosecutor, this Form should be completed after the Governor has indicated his/her approval of the request for temporary custody, expiration of the 30-day period and/or successful completion of a (Cuyler) hearing. Copies of this Form should then be sent to all officials who previously received copies of Form III. One copy should also be given to the prisoner and one copy should be retained by the Warden. Copies mailed to the prosecutor should be sent by certified mail, return receipt requested.

OFFER TO DELIVER TEMPORARY CUSTODY

To: HOWARD R. RELIN, DATED: **JANUARY 4, 1994**
Prosecuting Officer
(Insert Name and Title if Known)

GATES PD-MONROE COUNTY,
Court
(Jurisdiction)

(Continued on Next Page)

DRC 3127 (Rev. 6/88)

AGREEMENT ON DETAINERS: FORM IV (Continued)

And to all other prosecuting officers and courts of jurisdictions listed below from which indictments, informations or complaints are pending.

RE: FOSTER, LEROY No. A282-660
(Inmate) (Number)

Dear Sir:

Pursuant to the provisions of Article V of the Agreement on Detainers between this state and your state, the undersigned hereby offers to deliver temporary custody of the above-named prisoner to the appropriate authority in your state in order that speedy and efficient prosecution may be had of the indictment, information or complaint which is (described in the attached inmate's request which is dated **JANUARY 4, 1994**) (described in your request for custody of N/A).

(The required Certificate of Inmate Status is enclosed.)

If proceedings under Article IV(d) of the Agreement are indicated, an explanation is attached.

Indictments, informations or complaints charging the following offenses also are pending against the inmate in your state and you are hereby authorized to transfer the inmate to custody of appropriate authorities in these jurisdictions for purposes of disposing of these indictments, informations or complaints.

(Continued on Next Page)

AGREEMENT ON DETAINERS: FORM IV (Continued)

JURISDICTION: NEW YORK

OFFENSE: U S MARSHALS SERVICE

If you do not intend to bring the inmate to trial, will you please inform us as soon as possible?

Kindly acknowledge.

Dated: **JANUARY 4, 1994**

s/Norm Rose (Acting Warden) (s/KMR)
(Warden - Superintendent - Director)

CUSTODIAL AUTHORITY

NAME: Terry J. Collins, Warden
INSTITUTION: Lorain Correctional Institution
ADDRESS: 2075 S. Avon Belden Road
CITY/STATE: Grafton, Ohio 44044
TELEPHONE NO.: (216) 748-1049

[NEW YORK DEPT. OF CORRECTIONAL SERVICES]

Agreement on Detainers: Form VII

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of a prisoner's request for disposition of a detainer. If the offer has been received because another prosecutor in your state has initiated the request, use Form VIII. Copies of Form VII should be sent to the warden, the prisoner, the other jurisdictions in your state listed in the offer of temporary custody, and the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the acceptance and the judge who signs it.

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION WITH A PRISONER'S REQUEST FOR DISPOSITION OF A DETAINER

TO: Norm Rose (Acting Warden)
(Warden, Superintendent, Director)

Loraine Correctional Institution
(Institution)

2075 S. Avon Belden Road Grafton, Ohio 44044
(Address)

In response to your letter of January 4, 1994 and
(Date)

Agreement on Detainers: Form VII (Continued)

offer of temporary custody regarding LeRoy Foster aka Dwain Reed who is presently under indictment, information, complaint in the County of Monroe, Roch. N.Y. of which I
(Name of Prisoner) (Jurisdiction)
am Assistant District Attorney, please be advised that I accept
(Title of Prosecuting Officer)
temporary custody and that I propose to bring this person to trial on the indictment, information or complaint named in the offer within the time specified in Article III(a) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction, I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer, immediately after trial.

COMMENTS: [If your jurisdiction is the only one named in the offer of temporary custody, use the space below to indicate when you would like to send your agents to conduct the prisoner to your jurisdiction. If the offer of temporary custody has been sent to other jurisdictions in your state, use the space below to make inquiry as to the order in which you will receive custody, or to indicate any arrangements you have already made with other jurisdictions in your state in this regard.]

Signed: s/Gregory J. Huether

Title: ASSISTANT DISTRICT ATTORNEY

Agreement on Detainers: Form VII (Continued)

I hereby certify that the person whose signature appears above is an appropriate officer with the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: 4-11-94 Signed: s/David D. Egan
(Judge)

Monroe County Court Judge
(Court)

[NEW YORK DEPT. OF CORRECTIONAL SERVICES]

Agreement on Detainers: Form VI

In quadruplicate. All copies, signed by the prosecutor and the agent, should be sent to the Administrator of their own state. After signing all copies, the Administrator should retain one for his files. Send one to the warden of the institution in which the prisoner is located and return two copies to the prosecutor who will give one to the agent for use in establishing his authority and place one in his files.

EVIDENCE OF AGENT'S AUTHORITY TO ACT FOR RECEIVING STATE

TO: Honorable Thomas A. Coughlin, III
Administrator of the Agreement on Detainers

LeRoy Foster aka Dwain Reid is confined in
(Inmate)
Lorain Correctional Facility 2075 S. Avon Belden Road
(Institution) (Address)
Grafton, Ohio 44044 and will be taken into custody at the institution on 5/16/94 or 5/17/94 for return to this jurisdiction for trial on or about May 18, 1994 @ 9:30 A.M. in accordance with Article V(b), I have designated Andy DeMarco/Michael Spampinato whose signature appears below

Agreement on Detainers: Form VI (Continued)

as agent to return the prisoner.

s/Gregory J. Huether
(Prosecuting Official)

s/Michael Spampinato
s/Andrew DeMarco
(Agent's Signature)

TO: Warden

In accordance with the above representation and the provisions of the Agreement on Detainers, _____
(Agent)
is hereby designated as agent for this state to return _____

_____ for trial.
(Inmate)

s/P. Coombe
Agreement Administrator

STATE OF NEW YORK COUNTY OF MONROE
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

NOTICE OF MOTION

DWAIN REID (MICHAEL HILL),

Indict No. 160/94
Defendant. Filed: 3/11/94
Index No. 2549/94

PLEASE TAKE NOTICE that upon the annexed affirmation of EDWARD F. SCANLAN, Esq., attorney for the defendant, the undersigned will move this Court, at a criminal term thereof, before the Honorable David D. Egan, Monroe County Court Judge, located at the Hall of Justice, City of Rochester, County of Monroe, on the 26th day of April, 1995, at 9:30 a.m., or as soon thereafter as counsel may be heard, for the following relief:

1. An Order pursuant to CPL §580.20, Article III dismissing the Indictment herein with prejudice on the ground that he was not brought to trial within 180 days after he requested final disposition of the indictment, information or complaint.

2. An Order granting such other and further relief as this Court deems just and proper.

DATED: Rochester, New York
April 17, 1995

Yours, etc.

EDWARD J. NOWAK
Monroe County Public Defender
BY: EDWARD F. SCANLAN
Assistant Public Defender
10 North Fitzhugh St.
Rochester, NY 14614
(716) 428-5210

TO: HOWARD R. RELIN
Monroe County District Attorney

ATTN: GREGORY HUETHER
Assistant District Attorney

STATE OF NEW YORK COUNTY OF MONROE
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs- AFFIRMATION

DWAIN REID (MICHAEL HILL),

Defendant.

STATE OF NEW YORK)
COUNTY OF MONROE) ss:
CITY OF ROCHESTER)

EDWARD F. SCANLAN, an attorney admitted to practice in the State of New York, affirms under penalty of perjury pursuant to CPLR 2106 that:

1. I am an Assistant Public Defender for the County of Monroe and have been assigned to represent the defendant in this action.

2. I make this affirmation in support of the relief requested in the annexed Notice of Motion and for such other and further relief as to this Court may seem just and proper.

3. The source and ground for your affiant's belief on the allegations made in each paragraph of this motion are conversations between your affiant and defendant, and a review of the various and sundry papers filed in connection with the indictment.

4. On or about December 30, 1993, defendant was a sentenced prisoner in the State of Ohio at the Lorain Correctional Institution in Grafton, Ohio. That sentence in the State of Ohio has not yet expired.

5. On or about December 30, 1993, a detainer accusing defendant of Murder Second Degree and Robbery First Degree in Monroe County, New York State, was lodged

against defendant at the Lorain Correctional Institution.

6. On or about January 4, 1994, the warden of the Lorain Correctional Institution advised the defendant of the detainer and on that same date defendant made a formal request pursuant to the Agreement on Detainers for a final disposition of the Monroe County charges of Murder Second Degree and Robbery First Degree.

7. On or about January 10, 1994, defendant's request for a final disposition pursuant to the Agreement on Detainers was delivered to the court and prosecutor in Monroe County.

8. Since January 10, 1994 until April 17, 1995, four hundred sixty two (462) days have elapsed and defendant has not been tried on these charges. Article III of the Agreement on Detainers states that defendant shall be tried within 180 days after the notice of his request for a final disposition.

9. The prosecution has never requested that this court "grant any necessary or reasonable continuance . . . for good cause shown in open court, the prisoner or his counsel being present" as required by Article III of the Agreement on Detainers.

10. The only tolling of this 180 day time period that can reasonably be argued by the prosecution is the period of time from the service of defendant's omnibus motion until the conclusion of the hearings and this Court's decision on the matters raised therein. That period of time commenced on July 12, 1994 and ended on December 5, 1994 when the Court rendered its written decision, a period of one hundred forty six (146) days.

11. Tolling the time period for that 146 days still leaves a time period of three hundred sixteen (316) days that has elapsed since notice of defendant's request for final disposition was received, well beyond the one hundred eighty (180) days allowed by the Agreement on Detainers.

12. Wherefore, defendant requests this Court to dismiss this Indictment under prejudice pursuant to the Article on Detainers, CPL §580.20, or for a hearing to resolve any disputed issues of fact raised by this motion and the

prosecution's response.

s/Edward F. Scanlan
EDWARD F. SCANLAN

Affirmed this
17th day of April, 1995

STATE OF NEW YORK COUNTY OF MONROE
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DWAIN REID,

Defendant.

REPLY TO NOTICE OF MOTION

IND 160/94

PLEASE TAKE NOTICE, that upon the Defendant's Motion to Dismiss Indictment under CPL Article 580.20 and for other further relief, the affidavit upon which that motion was made, and the annexed Affirmation of GREGORY J. HUETHER, ESQ., in support of this cross-motion will be made by the undersigned, pursuant to Section 240.20 of the Criminal Procedure Law, upon the argument of the Defendant's motion, for an Order allowing Dismissal of the Indictment and for other further relief as set forth in the annexed Affirmation.

Dated: Rochester, New York
April 24, 1995

Yours, etc.

HOWARD R. RELIN
DISTRICT ATTORNEY OF
MONROE COUNTY
201 Hall of Justice
Rochester, New York 14614
BY: GREGORY J. HUETHER
Assistant District Attorney

To: Edward Scanlan, Esq.

STATE OF NEW YORK COUNTY OF MONROE
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DWAIN REED,

Defendant.

ANSWERING AFFIRMATION

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

I, GREGORY J. HUETHER, ESQ., an attorney duly admitted to practice law in the State of New York, and an Assistant District Attorney in and for the County of Monroe, hereby affirms under the penalties of perjury, the following:

1. I am an attorney admitted to practice law in the State of New York, and an Assistant District Attorney for the County of Monroe.

2. That I base my response upon personal knowledge as well as upon information and belief, the sources of which include my review of various reports, papers, and documents, as well as conversations with witnesses and parties herein.

3. That I specifically deny each and every allegation of the defendant's motion papers, and specifically assert that there is no violation of CPL 580.20 with respect to the trial of this defendant.

4. CPL Article 580.20 provides a statutory framework for resolution of detainers lodged against inmates imprisoned outside this state. Under Article III, a 180 day requirement for trial on the detainer is established, and may be extended upon good cause being shown in open court with the defendant and his attorney present. The court having jurisdiction of the

matter, "may grant any necessary or reasonable continuance" (CPL 580.20, Article III[a]).

The People respectfully submit that due to this defendant's actions, together with his attorney, all time from his arraignment on May 18, 1994 to the present is fully excludable, and that additional time preceding such appearance is likewise excludable.

5. The defendant's motion papers fail to set forth a number of significant dates in the history of this case, and simply allege a totality of days in excess of the 180 day time limit has occurred.

The following chronological sequence is of great significance in determining the instant motion by the defense.

(a) December 30, 1993 - defendant served with a warrant detainer while defendant was incarcerated as a sentenced prisoner at the Lorain Correctional Facility in Ohio.

(b) January 4, 1994 - defendant signed an Agreement on Detainers for New York State and for the Federal Government.

(c) January 7, 1994 - Monroe County District Attorney's Office's first receipt of above demand.

(d) February 28, 1994 - scheduled trial date for co-defendant Jeffrey Tobias to be tried on this date for same crimes. Trial cancelled. Grand Jury presentation as to this defendant and co-defendant Earl Williams begun on March 1, 1994.

(e) March 9, 1994 - Grand Jury presentation against both defendants completed.

(f) March 11, 1994 - Indictment warranted lodged against the defendant in Ohio.

(g) April 7, 1994 - People send their completed application form with all certified documents to Ohio for defendant's return. Received by Ohio April 11, 1994.

(h) April 13, 14, 15, 1994 - Further forms delivered to and from Ohio by Monroe County District Attorney's Office through Albany Governor's Office.

(i) April 20, 1994 - defendant's original date scheduled

for his pickup. Cancelled due to necessary transfer of papers to foreign state being delayed.

(j) May 13, 1994 - Defendant delivered to the Monroe County Jail.

(k) May 18, 1994 - Defendant arraigned on indictment. Case adjourned for motions on the 45 day calendar. No objection made by defendant and his counsel, and at their request. The People announced readiness, and were in fact ready. (See transcript attached).

(l) July 20, 1994 - Adjourned with consent of defendant and counsel to argue motions. (See transcript attached).

(m) July 29, 1994 - Argument held and hearings ordered. Grand Jury minutes provided without delay.

(n) August 19, 1994 - Hearing, pursuant to defendant's motions, begun and not completed. Adjourned to continue without objection.

(o) September 20, 1994 - Hearing scheduled and continued. Adjourned to October 3, 1994.

(p) October 3, 1994 - Defense unable to proceed due to attorney unavailability.

(q) October 12, 1994 - Hearing continued and completed. Adjourned by consent of defendant to submit arguments and exhibits to Court.

(r) November 16, 1994 - Court control date for decision. Case put onto trial calendar without date, and no decision. No objection by defendant and his attorney. (See transcript attached).

(s) December 5, 1994 - Court renders written decision.

(t) January 9, 1995 - Court sets trial date for May 1, 1995 with defendant and attorney. Attorney for defendant expressly states, "That will be fine, Your Honor". (See attached transcript).

6. It is clear from the above chronology of events that the People have, at all times, exercised due diligence in their efforts to respond and comply with the defendant's demand for resolution of the charges against him. Both as to pre-

indictment and post-indictment times, the People acted promptly and reasonably in scheduling and taking all necessary steps to return this defendant from Ohio.

The defendant's incarceration in Ohio does, by itself, entail a lengthy, complicated, and necessarily time consuming effort to return him to New York State. Despite that fact, the People effected the defendant's return in approximately sixty-seven days from Indictment on March 11, 1994 to his arraignment on May 18, 1994.

The People submit that the period of delay attributable to the process necessary in returning the defendant should be held as excludable since honoring the defendant's request necessarily involved a period of delay for statutory compliance once an indictment had been obtained. Indeed, Section 580.20 Article IV recognizes and provides a built-in 30 day period which is excluded for defendant to respond. While not applicable here, since we are proceeding under Article III, this recognition should likewise exist for the delay involved in this process. See People v. Chan, 81 AD2d 765 (First Dept., May 1981) recognizing the exclusion of such a period as being quite reasonable. See also People v. Vrlaku, 73 NY2d 800 (1988) at 802, where the Court of Appeals recognized that where the defendant's own conduct subjected himself to Federal and State prosecution, the 180 day time period was to be extended. The process of complying with this defendant's request is no less a result of his "conduct" in making his demand, and inherently involves time when he cannot be available without the required compliance in submitting voluminous documents to the foreign state.

7. Even assuming arguendo that all time up to the defendant's arraignment is not excludable, the People did return the defendant to this Court for trial in less than 180 days. All additional time since his return has been expended either solely due to the defendant and his attorney's request, or with their explicit, unequivocal consent. Now, on the very eve of the agreed upon date for trial, the defendant lodges this complaint as to the delay he has sought and occasioned on numerous

appearances before this Court.

8. Specifically, this defendant appeared at arraignment with counsel, and agreed to and requested the opportunity to file omnibus motions with the Court.

By his own actions, the defendant himself cannot fairly be considered to be ready for trial. The defendant's own unreadiness also tolls the time limits of Article 580.20. See People v. Cook, 63 AD2d 841 (Fourth Dept., 1978) at page 842. Also, People v. Chiofalo, 73 AD2d 673 (Second Dept., 1979), stating, "The purpose of the detainer agreement in requiring a prompt trial on outstanding indictments is not to be thwarted by a defendant who might occasion delay and then attempt to obtain a dismissal based upon that delay".

9. While the defendant's papers recognize the motion period as generally excludable, they attempt to limit their share from only July 12, 1994 to December 5, 1994.

A review of the defendant's arraignment transcript provides clear support that the time period extends well before July 12, 1994.

Similarly, the defendant's posture even as of January 9, 1995 contradicts and belies such a claim, especially with the explicit agreement to the May 1, 1995, trial date without any reservation. That date was specifically agreed upon by the defense after the Court and both counsel reviewed their prospective schedules and availability in 1995. The defendant has continually agreed with such a date and delay, and now claims such time is entirely without his consent and cannot be excluded.

10. The People submit that both as to pre-arraignment times and as to post-arraignment appearances by the defendant, the People have hereby demonstrated "good cause shown" which serves as a basis to exclude significant portions of time, and bring this defendant's trial well within the 180 day time limit of CPL Article 580.20.

Both as to requests for adjournments, periods of delay occasioned by or consented to by the defendant and his attorney, and as to periods of the defendant's own unreadiness,

the elapsed times have constituted periods which are fairly considered as excludable from computation.

By all calculations, the People are well within the 180 day time limit of bringing the defendant to trial by all of the above excludable periods.

Therefore, the People respectfully request the motion be denied entirely, and for any and all relief as this Court may deem proper.

Affirmed under penalty of perjury pursuant to Section 2106 of the CPLR, this 24th day of April, 1995.

Respectfully submitted,

HOWARD R. RELIN
DISTRICT ATTORNEY OF
MONROE COUNTY
By: s/Gregory J. Huether
GREGORY J. HUETHER, ESQ.
Assistant District Attorney

[COURT PROCEEDING OF JANUARY 9, 1995]

COUNTY COURT : STATE OF NEW YORK

COUNTY OF MONROE: CRIMINAL BRANCH

THE PEOPLE OF THE STATE OF NEW YORK x #94-0160

-against- x Murder 2d
Robbery 1st

DWAIN REED, aka MICHAEL HILL, x

Defendant. x Set Trial

x Date

Hall of Justice
Rochester, NY 14614
January 9, 1995

Before:

HONORABLE DAVID D. EGAN,

County Court Judge

Appearances:

HOWARD R. RELIN, ESQ.
District Attorney, Monroe County
BY: TIMOTHY PROSPERI, ESQ.
Assistant District Attorney

EDWARD J. NOWAK, ESQ.
Public Defender, Monroe County
By: EDWARD SCANLAN, ESQ.
Assistant Public Defender

Defendant Appears in Person

SUSAN R. FURGIUELE, C.S.R.
Official Court Reporter
Hall of Justice, Room 20
Rochester, NY 14614

MR. PROSPERI: Sir, you are Dwain Reed?

THE DEFENDANT: Yes, sir.

MR. PROSPERI: Your Honor, Mr. Huether from our office is engaged in a trial today. He told me that the Court was to set a trial date today. I believe the Court may have preliminarily discussed a May 1st date. And Mr. Huether says that would fit in his calendar.

THE COURT: How is that with the defense counsel?

MR. SCANLAN: That will be fine, Your Honor.

THE COURT: This matter's adjourned to May the 1st, 1995 for trial.

Now, it's my understanding he's already serving twenty-five years in Ohio?

MR. SCANLAN: Eight to twenty-five.

THE COURT: Eight to twenty-five. So there's no danger of him being released at all so no sense in my giving him his Parker warnings.

All right. See you on May the 1st for trial.

MR. SCANLAN: Further matter, Your Honor. Court may recall there's a co-defendant indictment, Earl Williams, who was recently brought back to this jurisdiction I think within the last couple of months. I assume that's also on your calendar.

THE COURT: Doesn't look like it's going to be ready on time for trial on that date.

MR. SCANLAN: I was going to remind the Court in case you were thinking that, that we had moved for severance.

THE COURT: If I try to put it on the same day, you bring that issue up again. But I don't think it's going to be ready; hearings, et cetera.

MR. PROSPERI: Thank you. The People remain ready for trial.

* * * * *

CERTIFICATION

I, SUSAN R. FURGIUELE, hereby certify that I am an Official Court Reporter, Monroe County, New York, duly appointed and assigned to the within Court;

That I reported in stenotype shorthand the proceedings had in County Court, on the 9th day of January, 1995, before the Hon. David D. Egan, Judge, in the matter of THE PEOPLE OF THE STATE OF NEW YORK -vs- DWAIN HILL, aka MICHAEL HILL, Defendant;

And the foregoing transcript, pages numbered 2 through 3, is a true, accurate and complete record of those shorthand notes.

s/Susan R. Furgiuele, C.S.R.
Official Court Reporter

Dated this 20th day of
April, 1995, at
Rochester, New York

[COURT PROCEEDING OF JULY 20, 1994]

STATE OF NEW YORK
COUNTY OF MONROE: COUNTY COURT

----------x

THE PEOPLE OF THE STATE OF NEW YORK: INDICT. NO. : 94-0160
:Murder 2
-against- :Robbery 1
:
MICHAEL HILL, aka DWAIN REID, :
:
Defendant. :Argue
:Motions

----------x

Hall of Justice
Rochester, New York
July 20, 1994

BEFORE:

HONORABLE DAVID D. EGAN
County Court Judge

APPEARANCES:

HOWARD R. RELIN, ESQ.
District Attorney, Monroe County
BY: GREG HUETHER, ESQ.
Assistant District Attorney
On behalf of the People of the
State of New York

EDWARD NOWAK, ESQ.
Public Defender, Monroe County
BY: EDWARD SCANLAN, ESQ.
Assistant Public Defender
On behalf of the Defendant

REPORTED BY:

CAROLANN M. SCORZA, CSR
Senior Court Reporter

MR. HUETHER: For the record, sir, is your name Michael Hill, also known as Dwain Reid?

MR. SCANLAN: My client indicates his real name - - -

THE COURT: I can't hear him. You have to speak up.

THE DEFT: My name is Dwain Reid. I never went by the name Michael Hill.

MR. HUETHER: Mr. Scanlan is your attorney, here today; is that correct?

THE DEFT: Yes.

MR. HUETHER: Your Honor, Mr. Scanlan filed motions with my office, an Omnibus motion, and made it returnable for today. I just completed a trial yesterday and have not had the opportunity to draft a written response.

MR. SCANLAN: My client and I have no objection to an adjournment for that, Your Honor.

MR. HUETHER: I would request a brief adjournment to allow a written response, Your Honor, and I believe we will ultimately head towards a Wade Hearing based upon my recollection and information in the case.

THE COURT: Okay, adjourned to July 29th, then, for argument of motions.

MR. SCANLAN: Thank you, Your Honor.

THE COURT: That's with consent of both attorneys.

MR. HUETHER: Thank you, Your Honor.

(Whereupon this matter was concluded.)

* * *

CERTIFICATION

I, CAROLANN M. SCORZA, CSR hereby certify that I am a Senior Court Reporter, at Rochester, Monroe County, New York, duly appointed:

That I reported in stenotype shorthand the proceedings had in Monroe County Court, on the 20th day of July, 1994 before the Honorable David D. Egan, in the matter of the People of the State of New York against Michael Hill, aka Dwain Reid, Defendant.

And the foregoing transcript, pages numbered 1 and 2 respectively, is a true, accurate and complete record of those shorthand notes.

s/Carolann M. Scorza
SENIOR COURT REPORTER

Dated this 20th day of
April, 1995
at Rochester, New York

[COURT PROCEEDING OF NOVEMBER 16, 1994]

STATE OF NEW YORK
COUNTY OF MONROE: COUNTY COURT

----------x

THE PEOPLE OF THE STATE OF NEW YORK: INDICT.
: NO.
-against- : 94-0160
: Murder 2
MICHAEL HILL, aka DWAIN REID, : Robbery1
:
Defendant :CONTROL

----------x

Hall of Justice
Rochester, New York
November 16, 1994

BEFORE:

HONORABLE DAVID D. EGAN
County Court Judge

APPEARANCES:

HOWARD R. RELIN, ESQ.
District Attorney, Monroe County
BY: GREG HUETHER, ESQ.
Assistant District Attorney
On behalf of the People of the
State of New York

EDWARD NOWAK, ESQ.
Public Defender, Monroe County
BY: EDWARD SCANLAN, ESQ.
Assistant Public Defender
On behalf of the Defendant

REPORTED BY:

CAROLANN M. SCORZA, CSR
Senior Court Reporter

MR. HUETHER: Good morning, sir. Is your name Dwain Reid?

THE DEFT: Yes.

MR. HUETHER: Mr. Scanlan is your attorney?

THE DEFT: Yes, sir.

THE COURT: Alright, this is down for control date to make sure the minutes were sent to me and any memos, and I gather that's all been done?

MR. SCANLAN: That's correct.

MR. HUETHER: Your Honor, I did obtain the transcripts from the first and second trial regarding Elaine Weeks and I submitted those and I also submitted both sets of exhibits that were used in the prior trials that would have been presented, and the stickers and exhibit markers are accordingly coincidental with the transcripts. So you have everything, I think, that we discussed at the last appearance.

THE COURT: And, also, everyone made their final remarks on this.

MR. SCANLAN: That's correct.

THE COURT: Okay, thank you. The case will go on the trial calendar and I will review it and make a decision and get it over to you.

MR. SCANLAN: Very well. Thank you.

(Whereupon this matter was concluded.)

* * *

CERTIFICATION

I, CAROLANN M. SCORZA, CSR hereby certify that I am a Senior Court Reporter, at Rochester, Monroe County, New York, duly appointed:

That I reported in stenotype shorthand the proceedings had in Monroe County Court, on the 16th day of November, 1994 before the Honorable David D. Egan, in the matter of the People of the State of New York against Michael Hill, aka Dwain Reid, Defendant.

And the foregoing transcript, pages numbered 1 through 3, is a true, accurate and complete record of those shorthand notes.

s/Carolann M. Scorza
SENIOR COURT REPORTER

Dated this 20th day of
April, 1995
at Rochester, New York

[COURT PROCEEDING OF MAY 18, 1994]

COUNTY COURT STATE OF NEW YORK
COUNTY OF MONROE

----------x

THE PEOPLE OF THE STATE OF NEW YORK: Indict.
: No. 160
-vs- : Filed
: 3/11/94
DWAIN REED, a/k/a MICHAEL HILL, :Murd. 2d
a/k/a LEROY FOSTER, :Rob. 1st
:
Defendant. :Arraign-
----------x ment

Hall of Justice
Rochester, New York
May 18, 1994

Before:

HONORABLE DAVID D. EGAN
Monroe County Court Judge

Appearances:

For the People
HOWARD R. RELIN
District Attorney, Monroe County
BY: RICHARD ROXIN, ESQ.
Assistant District Attorney

For the Defendant
EDWARD J. NOWAK, ESQ.
Public Defender, Monroe County
BY: BARBARA FARRELL, ESQ.
RICHARD MARCHESE, ESQ.
Assistant Public Defenders

DEFENDANT, present

REPORTED BY:
Michael J. DeVito, C.S.R.
Official Court Reporter

MR. ROXIN: Are you Michael Hill also known as Dwain Reid?

THE DEFENDANT: I'm Dwain Reid.

MR. ROXIN: Appearing in court today with Assistant Public Defender Barbara Farrell?

THE DEFENDANT: Yes.

MR. ROXIN: Your Honor, may this be adjourned to two o'clock this afternoon. It's being handled by Assistant District Attorney Gregory Huether who is on trial. He's in the middle of proceedings right now in front of Judge Sirkin.

I believe he would like to personally appear before the Court at that time.

THE COURT: Telling me you don't have a copy of the indictment, or something, or paperwork needed, or what's going on?

MR. ROXIN: Question of paperwork, Your Honor, and as this matter is an add-on to this morning's calendar, I believe the request is reasonable.

THE COURT: All right. Could we have him back here at 1:30? Could the district attorney be ready at 1:30?

MR. ROXIN: I will speak to Mr. Huether by then.

THE COURT: All right. Well, what we'll do is give him a little more time. We'll make it two o'clock.

(Case held to be recalled at two o'clock PM.)
(Two o'clock appearance for defendant is Richard Marchese.)

MR. ROXIN: Are you Michael Hill?
THE DEFENDANT: Yes, sir.
MR. ROXIN: Also known as Dwain Reid?
THE DEFENDANT: That's my real name, sir.

MR. ROXIN: Appearing in court today with Assistant Public Defender Richard Marchese?

THE DEFENDANT: Yes.

MR. ROXIN: Your Honor, it's a sealed indictment. May I unseal it and proceed?

THE COURT: Please do. Is this - - Mr. Hill, or Mr. Reid, is your birthday April the 12th, 1967, or February 11th, 1967, or some other date?

THE DEFENDANT: Third the 12th - - March 12, 1967.

THE COURT: Okay.

MR. ROXIN: Mr. Reid, by Indictment 160, of 1994, filed on March 11, 1994, the Monroe County Grand Jury has filed this indictment which charges you with one count of murder in the second degree; one count of robbery in the first degree, as having been committed on or about December 31, 1992, in the County of Monroe, State of New York.

Do you waive a full reading of the indictment?

MR. MARCHESE: I would waive full reading of the indictment on his behalf and enter not-guilty pleas to all counts.

Our office interviewed Mr. Reid for eligibility. He's eligible for the services of the public defender.

THE COURT: Appointment is made nunc pro tunc.

MR. MARCHESE: I will try to get the information to the Court and assistant district attorney as soon as possible as to who the attorney of record will be. I acknowledge receipt of a 710.30 notice.

MR. ROXIN: There is attached to the indictment a CPL 710.30 notice indicating an oral statement made by this Defendant to a law enforcement officer which the People intend to make use of at the time of trial.

Further indicates that there were identification procedures employed in this case, which the People further intend to make use of at the time of trial.

And CPL 710.30 notice finally contains demand for notice of alibi. People are ready for trial.

In addition to that I would like to serve upon the Defendant's attorney at this time the following documents, if I may? First is page 5 of the Gates Police Department crime report for crime report 4049-A.

In addition to that I'd like to serve upon the Defendant's attorney a Gates Police Department notification and waiver and an attached four-page Gates Police Department crime report again for CR4049-A.

THE COURT: Any particular dates on those crime reports?

MR. ROXIN: Those crime reports are dated - - first of all, Gates Police Department notification and waiver is dated March 11, 1994. The Gates Police Department addendum report which I referred, four pages in length, for identification purposes has in the top right-hand corner date of incident 12-31-92.

Finally, I'm serving upon the Defendant's attorney two-page memorandum which is typed and was submitted by Timothy Patton, sergeant with the - - I believe he's with the Cuyahoga County Sheriff's Department, entitled "Caribbean/Gang Task Force".

THE COURT: Is there a date on that?

MR. MARCHESE: No, Your Honor.

THE COURT: You gave the CR number, I believe?

MR. ROXIN: Yes, Your Honor, signed at the bottom by Lieutenant A. Hamill of the Gates Police Department. And for identification purposes, it is labeled as page 5 and CR number again is 4049-A. People are ready for trial.

THE COURT: Thank you. And both attorneys have been given a copy of the Court's pretrial order. Case will go on the motion calendar.

Question of bail? District Attorney's position?

MR. ROXIN: We are asking this Court to hold the Defendant without bail. If the Court is inclined to set bail, I would like to be heard on that issue.

MR. MARCHESE: We have no opposition to the no-bail request at this time, Your Honor.

THE COURT: Now is the defendant presently serving time in another jurisdiction?

MR. MARCHESE: Yes, Your Honor, that's my understanding.

THE COURT: What does the District Attorney have in that regard?

MR. ROXIN: Your Honor, the information we have is that he is serving time in the State of Ohio.

THE COURT: You don't know how much or anything?

MR. ROXIN: Not at this time. I don't have that information. The transport deputy has indicated he believes it's nine to twenty-five years.

THE COURT: The Defendant is remanded to the custody of the Sheriff of the County of Monroe- without bail. Anything further?

MR. MARCHESE: Want to calendar it for a date?

THE COURT: You have forty-five days within which to make your motions. It's on the motion calendar.

MR. ROXIN: Again, the People are ready for trial.

THE COURT: All right.

* * * * * * * * * * * *

(Arraignment is concluded.)

CERTIFICATION

I, Michael J. DeVito, hereby certify that I am an Official Court Reporter, Supreme and County Courts, Rochester, Monroe County, New York, duly appointed;

That I reported by machine shorthand the proceeding had in Monroe County Court on the 18th day of May, 1994, before the Honorable David D. Egan, Monroe County Court Judge, in the matter of the People of the State of New York against Dwain Reid, a/k/a Michael Hill, a/k/a Leroy Foster, Defendant;

And the foregoing transcript, pages numbered 2 through 8, is a true, accurate and correct record of my machine shorthand notes.

s/Michael J. DeVito
Michael J. DeVito

Dates this 20th day
of April, 1995
at Rochester, New York

STATE OF NEW YORK COUNTY OF MONROE
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DWAIN REID (MICHAEL HILL),

Defendant

RESPONDING
AFFIRMATION
Indict. No. 160/94
Filed 3/11/94
Index No. 2549/94

STATE OF NEW YORK)
COUNTY OF MONROE) ss:
CITY OF ROCHESTER)

EDWARD F. SCANLAN, an attorney admitted to practice in the State of New York, affirms under penalty of perjury pursuant to CPLR 2106 that:

1. I am the First Assistant Public Defender for the County of Monroe and have been assigned to represent the defendant in this action.

2. This affirmation is made in response to prosecution's reply to my Notice of Motion to Dismiss the Indictment pursuant to CPL Article 580.20.

3. The information contained herein is made upon personal knowledge or upon information and belief, the sources for such information and belief being a review of the various papers filed relative to this Indictment.

4. On January 9, 1995 this Court set a trial date of May 1, 1995. By responding that the day would be fine, your affiant was merely indicating that there was no barrier to proceeding on that date.

5. In the latter of part of December 1994, your affiant was contacted by telephone by this Court's secretary, Delores Madau, who inquired if your affiant could be ready to proceed

to trial in January or February of 1995. Your affiant responded that any date in those two months would be acceptable. Mrs. Madau indicated the case would be called in the first week of January to set a trial date. Your affiant asked it be called on January 9, 1995, rather than the prior week, and Mrs. Madau agreed to calendar the case for the 9th of January, 1995 to set a trial date.

6. Since December 5th of 1994, your affiant has never indicated a lack of readiness for any trial date for this Indictment, nor has your affiant or defendant ever requested or suggested a trial date beyond the 180 day limit, or waived the 180 day limit.

7. Your affiant specifically denies that portion of paragraph 9 of the prosecution's Reply to Notice of Motion that states the May 1, 1995 trial date "was specifically agreed upon by the defense after the Court and both counsel reviewed their prospective schedules and availability in 1995."

8. Your affiant was able and ready to try this case in January or February of 1995 and advised this Court's secretary, Mrs. Madau, of this availability.

9. If the prosecution's schedule or the Court's schedule did not allow this trial to commence until May 1, 1995, that delay is not attributable to the defense.

s/Edward F. Scanlan
EDWARD F. SCANLAN

Affirmed this
2nd day of May, 1995

Supreme Court of the United States

No. 98-1299
– New York,
Petitioner
v.
Michael Hill

ORDER ALLOWING CERTIORARI. Filed May 17, 1999.

The petition herein for a writ of certiorari to the Court of Appeals of New York is granted.

May 17, 1999

(5)

No. 98-1299

In The

Supreme Court of the United States

October Term, 1998

THE STATE OF NEW YORK,

Petitioner,

vs.

MICHAEL HILL,

Respondent.

ON PETITION TO THE
NEW YORK STATE COURT OF APPEALS

BRIEF FOR PETITIONER

HOWARD R. RELIN
District Attorney of Monroe County
Counsel for Petitioner
Suite 382, Ebenezer Watts Building
47 South Fitzhugh Street
Rochester, New York 14614
(716) 428-5680

Of Counsel:
Robert Mastrocola,
Assistant District Attorney

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(3139)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

3788

QUESTION PRESENTED

Does a defendant's express agreement to a trial date beyond the 180-day period required by the Interstate Agreement on Detainers constitute a waiver of his right to trial within such period?

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(set out at Appendix to Petition for Certiorari A-1)

People v. Hill, 244 A.D.2d 927, 668 N.Y.S.2d 126, 693 N.E.2d 755 (N.Y. App. Div. [4th Dept.] 1997)
(set out at Appendix to Petition for Certiorari A-9 –A-10)

People v. Reid, 164 Misc.2d 1032, 627 N.Y.S.2d 234 (N.Y. Co. Ct. [Monroe Co.] 1995)
(set out at Appendix to Petition for Certiorari A-11)

JURISDICTION

The order/judgment of the New York Court of Appeals was entered on November 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a):

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Petitioner timely filed a petition for writ of certiorari on February 16, 1999 and this Court granted the petition on May 17, 1999 (*New York v. Hill*, __U.S. __, 119 S. Ct. 1754, 67 U.S.L.W. 3528 [1999]).

STATUTES INVOLVED

Interstate Agreement on Detainers - N.Y. Criminal Procedure Law §580.20 (McKinney 1995) (set out in full at Appendix to Petition for Certiorari A-17). The Interstate Agreement on Detainers (IAD) is a congressionally-sanctioned interstate compact within Article I, Section 10 of the United States Constitution (*Cuyler v. Adams*, 449 U.S. 433 [1981]). The federal enactment of the IAD is at 18 U.S.C. app. 2.

STATEMENT OF THE CASE

This matter stems from an incident which occurred in the Rochester, New York suburb of Gates on New Year's Eve 1992 in which respondent and three companions robbed and shot to death Michael Weeks at a motel. (The codefendants Earl Williams, Jeffrey Tobias and Dearco Hill were convicted at separate trials.) Respondent was incarcerated on a criminal conviction in Ohio when in late December 1993 a detainer for murder and robbery charges was lodged against him there by New York authorities. In early January 1994 respondent was advised of the New York detainer and he then initiated the process for his return to New York pursuant to Article III of the Interstate Agreement on Detainers (IAD) (N.Y. Criminal Procedure Law §580.20 [App. to Pet. for Cert. A-17– A-26]).[1] In May, at respondent's initial court appearance in New York (arraignment), the People announced readiness for trial (App. 50, 51). Following pretrial motions and hearings the court, on January 9, 1995, set the matter for trial on May 1, 1995 with the express agreement of both the People and respondent, as reflected in the following colloquy:

> MR. PROSPERI [the prosecutor]: Your Honor, Mr. Huether from our office is engaged

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1 The detainer forms for respondent were in the name of "Leroy Foster"; respondent was indicted as "Michael Hill a/k/a Dwain Reid"; the trial court in its published decision on respondent's IAD motion captioned the matter with these names reversed but the state appellate courts used the name "Michael Hill" only.

> in a trial today. He told me that the Court was to set a trial date today. I believe the Court may have preliminarily discussed a May 1st date. And Mr. Huether says that would fit in his calendar.
> THE COURT: How is that with the defense counsel?
> MR. SCANLAN: That will be fine, Your Honor. (App. 35).

At that time the People again announced our continued readiness for trial (App. 36).

Shortly before trial then respondent brought a motion to dismiss the indictment pursuant to the IAD. He contended that he had not been brought to trial within 180 days of his request for disposition of the charges under the Agreement (App. 21-25). The People opposed dismissal, contending that there were a number of excludable periods such that the time limit was not violated (App. 26-32). The court found that the 180-day period commenced on January 4, 1994 when respondent signed his request for disposition of the charges pursuant to Article III. (The correct starting date, as respondent himself recognized in his dismissal motion [App. 24 (pars. 7, 8)]), was actually January 10, 1994 when his request for disposition was delivered to the court and prosecutor in New York [*Fex v. Michigan*, 507 U.S. 43 (1993)]; however, since the difference involved is only six days it has no bearing on the ultimate disposition of this matter as explained *infra*.) Of the time elapsed from this date to January 9, 1995 when the trial date was set (for May 1, 1995) the court found that 167 days were chargeable to the People and the rest of the time excludable for disposition of respondent's motions as a "necessary and

reasonable continuance" pursuant to Article III(a) of the IAD and/or as time that respondent was "unable to stand trial" pursuant to Article VI(a). The court thus determined that the dispositive time period was from January 9 to April 17, when respondent brought his dismissal motion. (Thereafter on appeal both sides would agree that this was the dispositive time period.) The court concluded that respondent had waived his right to trial within the 180-day period by expressly participating in setting the trial date beyond this period. The court noted that at the time the trial date was set the 180-day period had not expired and that the trial could have been held within this period if respondent so desired (*People v Reid*, 164 Misc.2d 1032, 627 N.Y.S.2d 234 [N.Y. Co. Ct. (Monroe Co.) 1995]) (App. to Pet. for Cert. A-11 – A-16). The court thus denied respondent's motion to dismiss and the case proceeded to trial. (The court issued its decision on the motion on May 2, 1995, the day before trial actually began.) Respondent was subsequently convicted, following a jury trial, of murder in the second degree and robbery in the first degree and sentenced on June 8, 1995 to concurrent, indeterminate terms of incarceration of 25 years to life on the murder conviction and 8 1/3 to 25 years on the robbery conviction.

On appeal the sole issue raised by respondent was whether the trial court erred in declining to dismiss the indictment for lack of a timely trial under the IAD and on November 19, 1997 the New York Supreme Court, Appellate Division, Fourth Department unanimously affirmed for the reasons stated in the decision of the trial court (*People v. Hill*, 224 A.D.2d 927, 668 N.Y.S.2d 126, 693 N.E.2d 755 [N.Y. App. Div. (4th Dept.) 1997]) (App. to Pet. for Cert. A-9 – A-10).

On further appeal (by permission) then the New York Court of Appeals on November 18, 1998 unanimously reversed the order of the Appellate Division and dismissed the indictment against respondent, concluding that respondent's concurrence in the later trial date did not constitute a waiver of his rights under the IAD (*People v. Hill*, 92 N.Y.2d 406, 681 N.Y.S.2d 775, 704 N.E.2d 542 [N.Y. 1998]) (App. to Pet. for Cert. A-1–A-8). The People thereafter petitioned this Court for certiorari review, which was granted on May 17, 1999 (*New York v. Hill*, __U.S. __, 119 S. Ct. 1754, 67 U.S.L.W. 3528 [1999]) (App. 55).

SUMMARY OF ARGUMENT

Pursuant to the Interstate Agreement on Detainers respondent had a right to be tried within 180 days (absent certain excludable periods) of the delivery to New York authorities of his request for disposition of the murder/robbery charges which were the subject of the detainer. Respondent was transferred to New York and following the disposition of pretrial matters and prior to the expiration of the 180-day period the court and the parties met to set a trial date. The court proposed a particular date and solicited the parties' positions as to such. Although the date was beyond the statutory period, defense counsel - in respondent's presence - expressly agreed to such, saying, "That would be fine." By so doing respondent waived his right to trial within the statutory period was not thereafter entitled to await the running of the period and then claim that it had been violated, requiring dismissal of the charges. The New York Court of Appeals erred in allowing respondent to do so; its order/judgment should be reversed and respondent's murder and robbery convictions reinstated.

ARGUMENT

A. The IAD's provisions for trial within certain periods are statutory rights which a defendant may waive.

The Interstate Agreement on Detainers (IAD) is a congressionally-sanctioned interstate compact within the compact clause (Art. I, §10, cl. 3) of the United States Constitution and as such is a federal law subject to federal construction(*e.g., Carchman v. Nash*, 473 U.S. 716, 719 [1985]; *Cuyler v. Adams*, 449 U.S. 433 [1981]). As the purpose of the IAD is to provide a nationally uniform means of transferring prisoners between jurisdictions such can only be effectuated by nationally uniform interpretation (*Reed v. Farley*, 512 U.S. 339, 348 [1994], *reh. denied* 512 U.S. 1277 [1994] [plurality]; *see also,* 116 Cong. Rec. 38841 [1970] [Federal Government joined the Agreement "so that all jurisdictions will have uniform and simplified rules for the disposition of detainers and the exchange of prisoners"]). IAD rights, like most other statutory rights, are waivable (as respondent conceded below)(*e.g., Yellen v. Cooper*, 828 F.2d 1471, 1474 [10th Cir. 1987]; *Webb v. Keohane*, 804 F.2d 413 [7th Cir. 1986]; *United States v. Rossetti*, 768 F.2d 12, 18 [1st Cir. 1985]; *United States v. Lawson*, 736 F.2d 835 [2nd Cir. 1984]; *United States v. Johnson*, 713 F.2d 633, 653 [11th Cir. 1983], *cert. denied sub nom. Wilkins v. United States*, 465 U.S. 1081 [1984]; *Brown v. Wolff*, 706 F.2d 902, 907 [9th Cir. 1983]; *United States v. Odom*, 674 F.2d 228, 230 [4th Cir. 1982], *cert. denied* 457 U.S. 1125 [1982]; *United States v. Boggs*, 612 F.2d 991 [5th Cir. 1980], *cert. denied* 449 U.S. 857 [1980]; *United States v. Eaddy*, 595 F.2d 341 [6th Cir. 1979]; *Camp v. United States*, 587 F.2d 397 [8th Cir. 1978]; *United States v. Palmer*, 574 F.2d 164 [3rd Cir. 1978], *cert. denied* 437 U.S. 907 [1978]; *see generally, United States v. Mezzanatto*, 513 U.S. 196, 200-201 [1995] [there is a presumption of waivability of statutory rights]; *Peretz v. United States*, 501 U.S. 923, 936-937 [1991] [the most basic criminal rights are subject to waiver]). This is especially so since, although providing prosecutors with a simplified, standard procedure for obtaining prisoners in other jurisdictions, the IAD - particularly the provisions establishing time limits for trial - is primarily for the benefit of the prisoner[2] (*see,Cuyler*, 449 U.S. at 449; *United States v. Oldaker*, 823 F.2d 778, 780 [4th Cir. 1987]; *Webb*, 804 F.2d at 415; *Eaddy*, 595 F.2d at 344; *Palmer*, 574 F.2d at 167; *United States v. Ford*, 550 F.2d 732, 742 [2nd Cir. 1977], *affd. sub nom. United States v. Mauro*, 436 U.S. 340 [1978]; *see also, Carchman, supra*, 473 U.S. 716; *Mauro, supra*, 436 U.S. 340; IAD, art. I).

The Second Circuit in *United States v. Lawson* (*supra*, 736 F.2d 835) held that waiver occurs where the defendant intentionally relinquishes his rights or takes any action that is expressly or impliedly inconsistent with the provisions of the IAD (*id.*, at 840). This standard best comports with reason and practicality by focusing on the effect of the defendant's conduct instead of the precise phraseology or timing thereof. It also has the advantage of eliminating the kind of semantic debate so aptly marked by the case at bar and thus is less problematic since it holds a defendant to the fair consequences of his actions and prevents him, even though he fully concurred in the

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2 Under Article III – a prisoner-initiated transfer as in this case – the period is 180 days (Article III[a]); under Article IV – a prosecutor-initiated transfer – the period is 120 days (from the prisoner's arrival in the receiving state) (Article IV[c]).

"contrary" procedure, from evading prosecution by claiming that he did not actually "request" such.[3]

On the facts of the case at bar, whether characterized as waiver, estoppel or some other rubric respondent's conduct clearly precluded him from any relief under the IAD.

B. Respondent waived his right to trial within the IAD period by expressly agreeing to a trial date beyond that period.

A prisoner "cannot by his own action manufacture a violation of the [IAD] and then seek relief under it" (*Oldaker*, 823 F.2d at 781; *Boggs*, 612 F.2d at 993), and there can hardly be anything more contrary to or inconsistent with claiming the

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3 Some circuit courts have described the waiver standard in terms of a defendant's "affirmative request for treatment contrary to the IAD" (*e.g.*, *Yellen*, 828 F.2d at 1474; *Brown*, 706 F.2d at 907; *Odom*,, 674 F.2d at 230; *Eaddy*, 595 F.2d at 344). The genesis of this language appears to be the *Eaddy* case, which involved the anti-shuttling provision of the IAD (prohibiting, following a defendant's transfer to the receiving state, his return to the sending state prior to disposition of the detainer charges [Arts. III(d), IV(e)]). The *Eaddy* court relied on two earlier cases in which the courts had found no violation of the anti-shuttling provision because the defendant had requested his return to the sending state (*Ford*, 550 F.2d at 742; *United States v. Scallion*, 548 F.2d 1168, 1170 [5th Cir. 1977], *cert. denied* 436 U.S. 943 [1978]) (*Scallion* described this result in terms of estoppel instead of waiver). The latter cases cannot be read as compelling a wholly different result had the defendants expressly agreed to a return instead of "requesting" such since there is no logical distinction between such concepts/conditions and thus *Eaddy* cannot be construed as establishing any such distinction.

right to trial within 180 days than actively participating in setting the date for trial beyond 180 days. That this makes eminent sense has been recognized by the vast majority of courts that have addressed this precise issue.[4]

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4 Initially, the issue of waiver by inconsistent conduct need not even be reached since respondent's agreement to trial beyond the statutory period may also be deemed a "direct" waiver (i.e., a voluntary waiver of a known right). While certain courts have on occasion applied the *Johnson v. Zerbst* (304 U.S. 458 [1938]) standard of "knowing, voluntary and intelligent" in determining whether a defendant aware of his IAD rights waived the same (*see*, *Eaddy*, 595 F.2d at 344; *Rossetti*, 768 F.2d at 19 & n.8 [expressly declining to consider whether defendant unaware of rights may waive such]; *but see*, *Crooker v. United States*, 814 F.2d 75, 78 [1st Cir. 1987] [same court, while finding IAD inapplicable on facts of case, states that defendant's transfer to other jurisdiction at his request would not be an IAD violation since "defendant cannot request what might be a violation of the [IAD], and then assert the requested action as grounds for his release"]; *Birdwell v. Skeen*, 983 F.2d 1332, 1340 [5th Cir. 1993] [generally discussing waiver in terms of *Johnson v. Zerbst* standard]; *but see*, *Boggs*, *supra*, 612 F.2d 991 [same court holds that defendant's own actions which result in IAD violations constitute waiver] and *Scallion*, *supra*, 548 F.2d 1168 [same court holds that defendant by his actions estopped from asserting IAD violation]), it is clear that the *Johnson v. Zerbst* standard, applicable to fundamental constitutional rights, does not apply to the statutory procedural rights established by the IAD which are concerned with minimizing the disruption to a prisoner's treatment and rehabilitation and which are not essential to a fair trial or the reliability of the truth-seeking process (*see*, IAD, art. I; *Yellen*, 828 F.2d at 1474; *Webb*, 804 F.2d at 414-415; *Lawson*, 736 F.2d at 835; *Odom*, 674 F.2d at 230; *United States v. Black*, 609 F.2d 1330, 1334 [9th Cir. 1979], *cert. denied* 449 U.S. 847 [1980]; *Camp*, 587 F.2d at 400; *State v. Burrus*, 151 Ariz. 581, 583, 729 P.2d 935, 937 [Ariz. 1986]; *Finley v. State*, 295 Ark. 357, (contd.)

Certainly affirmative assent to a trial date is "action that [is], expressly or impliedly, inconsistent with the provisions of the IAD" (*Lawson*, 736 F.2d at 840). Respondent's position, as apparently accepted by the New York Court of Appeals, seizes upon the "affirmative request" language occasionally used by some courts in discussing waiver (*see*, p. 8 n.3, *supra*) and mistakenly applies such quite literally; thus, he suggests that whether there is a waiver (i.e., an affirmative request) turns on which party - the defendant, the prosecutor or the court - "speaks first" during the relevant discussion, which wrongly

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363,748 S.W.2d 643, 646 [Ark. 1988]; *People v. Sevigny*, 679 P.2d 1070, 1075 [Colo. 1984]; *Webb v. State*, 437 N.E.2d 1330, 1332 [Ind. 1982]; *see also*, *Palmer*, 574 F.2d at 167 [IAD, in contrast to constitutional rights, "constitutes nothing more than a set of procedural rules"]; *see generally*, *Carchman*, *supra*, 473 U.S. 716; *Cuyler*, *supra*, 449 U.S. 433; *Mauro*, *supra*, 436 U.S. 340). Thus to the extent that certain courts, in expressly or impliedly making a distinction between a prisoner who is aware of his IAD rights and one who is not, suggest that waiver of a known right must meet the *Johnson v. Zerbst* standard, as opposed to merely a voluntariness standard, such is incorrect as imposing an unjustifiably stringent test; indeed, the same courts' holdings that a defendant may also waive IAD rights even if unaware thereof directly undercuts the idea that the *Johnson v. Zerbst* standard applies, as it is irrational to make waiver more difficult when the defendant is aware of his rights. Here, respondent himself initiated his return to New York under the IAD (Article III). IAD Form I (App. 3-6), which notified respondent of the detainer, also explicitly informed him of his right to request final disposition of the charges and that if he made such a request he would be "brought to trial within 180 days, unless extended pursuant to provisions of the [IAD]" (App. 4 [emphasis added]). Respondent's subsequent explicit agreement to a trial date beyond the 180-day period was unquestionably voluntary and thus constituted waiver of his right to an earlier trial.

places too much emphasis on the concept of abstract linguistics and too little on the notions of common sense and fairness. Thus under this approach had the exact same colloquy occurred here but with the parties simply reversed (i.e., defense counsel proposing the May 1st trial date and the court responding that such was "fine") respondent would have waived the time limit, but because it was the other way around he did not. This simply cannot be; it is illogical and serves no purpose but to promote gamesmanship by, e.g., encouraging attorneys to wait to see who is "first" to mention a trial date. It should be readily apparent that the outcome of an entire case – conviction or instead dismissal (and indeed this is a murder case) – should not turn on a point so fine that it amounts to nothing more than hypertechnical semantics. What is important is that respondent had the ability to choose whether to accept or reject the proposed trial date, and the effect of accepting such was exactly the same as if he had "affirmatively requested" the date in the first instance.

The Ninth Circuit recognized this in *Brown v. Wolff* (*supra*, 706 F.2d 902) when it found that the defendant had waived his Article III 180-day trial right by explicitly agreeing to certain continuances (*id.*, at 907; *see also*, *United States v. Hines*, 717 F.2d 1481, 1487 [4th Cir. 1983], *cert. denied* 467 U.S. 1214, 1219 [1984][indicating that defendant's rejection of proposed trial date - leading to later date beyond statutory period - constituted request for continuance and thus was request to be treated inconsistently with IAD]).

Various state courts have reached the same conclusion with specific reference to the setting of the trial date. Obviously if a defendant has "requested" or "proposed"/"suggested" a trial date beyond the time limit there is waiver (*e.g.*, *People v. Sampson*, 191 Cal. App. 3d 1409, 237

Cal. Rptr. 100 [Cal. Ct. App. 1987]; *State v. Aukes*, 192 Wis. 2d 338, 531 N.W.2d 382 [Wis. Ct. App.1995]; *see also, State v. Greenwood*, 665 N.E.2d 579 [Ind. 1996]). It has also been recognized, though, that a defendant's agreement to a date proposed by the court and/or prosecutor is to be given the same effect.

In *Moon v. State* (258 Ga. 748, 375 S.E.2d 442 [Ga. 1988], *cert. denied* 499 U.S. 982 [1991], *reh. denied* 501 U.S. 1224 [1991]) the court and the attorneys met to set a trial date and agreed on a tentative date which was outside the IAD period. Thereafter, following expiration of the period and just prior to trial, the defendant moved for dismissal pursuant to the IAD but the court determined that he had waived his IAD rights by agreeing to the trial date. (Although when the trial date was set the IAD time period had apparently not yet started defense counsel subsequently triggered it by obtaining defendant's transfer.) In *People v. Jones* (197 Mich. App. 76, 495 N.W.2d 159 [Mich. Ct. App. 1992]), the court, in finding waiver, expressly equated a defendant's agreement to a proposed trial date with an affirmative request for such date. The court in *State v. Harris* (49 Conn. App. 121, 714 A.2d 12 [Conn. App. Ct. 1998]) likewise found that the defendant's agreement to a continued trial date constituted waiver. In *Commonwealth v. Corbin* (25 Mass. App. Ct. 977, 519 N.E.2d 1367 [Mass. App. Ct. 1988]) the court excluded a period where the prosecutor had requested a certain trial date and the defendant "expressly acquiesced". The court in *Toro v. State* (479 So.2d 298 [Fla. Dist. Ct. App. 1985]) reached the same result in stating that since the defendant acquiesced in fixing the trial date he could not "be heard to complain". Similarly, the court in *Commonwealth v. Washington* (488 Pa. 133, 411 A.2d 490 [Pa. 1979]) found that the defendant's consent to a continuance of

trial beyond the statutory period tolled such period (*see also, State v. Schmidt*, 84 Haw. 191, 199, 932 P.2d 328, 336 [Haw. Ct. App. 1997] [defendant by his actions "impliedly consented" to untimely trial date]; *State v Moore*, 882 S.W.2d 253, 258-259 [Mo. Ct. App. 1994], *cert. denied* 513 U.S. 1130 [1995] [delay of defendant's trial resulting from his affirmative action or agreement is not to be included in limitation period; defendant there (*inter alia*) consented to certain continuances]; *State v Dorsett*, 81 N.C. App. 515, 344 S.E.2d 342 [N.C. Ct. App. 1986] [defendant's agreement by stipulation to trial on or before certain date constituted waiver of any right to be tried prior to end of such period]).

Still other courts, while not finding waiver on the facts of the cases presented, have signaled their approval of the principle that a defendant's consent/acquiescence to delay constitutes waiver (*e.g., Sevigny*, 679 P.2d at1075 [voluntary waiver "requires a showing of record that defendant or his attorney freely acquiesced in a trial date beyond the speedy trial period"]; *State v. Smith*, 686 S.W.2d 543, 547-548 [Mo. Ct. App. 1985] ["any delay of a prisoner's trial which results from his . . . agreement is not to be included in the period of limitation"; also citing with approval case holding it proper to exclude delay where defendant expressly consented to continuance beyond limitation period]).

The New York Court of Appeals, in concluding here that respondent's "mere concurrence" in the proposed trial date was not a waiver, cited to (*inter alia*) *United States v. Eaddy* (*supra*, 595 F.2d 341) wherein the court found that defense counsel's indication that he "did not care" where the defendant was held pending trial did not constitute a waiver of the anti-shuttling provision. While the logic of such reasoning is debatable, it cannot be disputed that there is a distinction

between expressing indifference to something and expressing affirmative agreement to it (*see*, *Webb*, 804 F.2d at 415 [defendant's request that he either be returned to sending jurisdiction or stay in receiving jurisdiction pending trial held waiver of anti-shuttling provision]). Also, the specific location of a defendant pending trial obviously is an ancillary issue which does not directly bear on the time of trial, unlike the situation as in the case at bar where the court and parties meet for the very purpose of setting the trial date. Moreover, it is not even apparent from the decision in *Eaddy* that counsel's indifference was in response to the trial court's (or prosecutor's) proposal to return the defendant to the sending jurisdiction, as the matter is characterized by the court in terms of the defendant's "failure to state a preference" as to his place of incarceration; here in contrast a particular trial date was expressly proposed and respondent's approval or disapproval thereof sought. (In addition, the *Eaddy* court also emphasized that there was no indication that the defendant there was aware, particularly from the detainer documents, of his Article IV [including anti-shuttling] rights, while as previously noted respondent here was informed in the detainer documents of his right to trial within 180 days.)

The New York Court of Appeals also cited in support of its holding *People v. Allen* (744 P.2d 73 [Colo. 1987]), a case relied on heavily by respondent in the state appellate process. However, while *Allen* on its face supports respondent's view, analysis discloses that other factors prompted the court's ultimate disposition of the matter, and in any event to the extent it stands for the proposition that agreement to a proposed date is not waiver it stands not only contrary to common sense and to the view adopted by almost all other courts but also as an anomaly within its own

jurisdiction.

In *Allen* the prosecutor initiated the defendant's return pursuant to Article IV. At arraignment the parties agreed to a trial date which was beyond the statutory period but no mention was made of the IAD. A short time later the court apparently became aware of the detainer and informed the prosecutor of a "detainer problem" but the prosecutor did nothing. The court thus set the case for hearing for the purpose of setting a trial date within the IAD limit. A new date was then set, with the parties' agreement, which was within the Article III (180-day) limit but still outside the Article IV (120-day) limit. (After the prosecutor had initiated Article IV proceedings the defendant had requested disposition of the detainer charges pursuant to Article III.) At the expiration of the 120-day period the defendant moved for dismissal under the IAD and the trial court, finding the case to be an "Article IV case", granted the motion. In denying the People's reconsideration request the court found that defense counsel was unaware of the Article IV status of the case when the new trial date was set and thus had not deceived the court.

On appeal the Colorado Supreme Court upheld the dismissal. While stating that "mere silence" at the setting of a trial date is not waiver and that instead "affirmative conduct evidencing such a waiver must be shown" (*People v. Allen*, *supra*, at 75-76), and acknowledging that it had recently held in a related context that waiver occurs when the defense freely acquiesces in a trial date beyond the statutory speedy trial period, the court nonetheless stated that the latter waiver concept is based on the fact that a defendant's participation in selecting a trial date would contribute directly to any violation (*id.*, at 76). The court went on to find that the defendant's acquiescence in the trial dates there had not directly contributed

to the IAD violation but rather the violation occurred because the prosecution was unaware of the precise character of the defendant's IAD rights and failed to comply with its obligations under the Act (*id.*, at 76-78). The court emphasized that the prosecution generally carries the burden of compliance with the IAD, and particularly in Article IV cases (in contrast to Article III cases) the prosecution has control over the running of the time period since it is its request which triggers the transfer. Since the prosecution there never informed the court or defense counsel of its Article IV request (it had also failed to provide the defense with necessary discovery, which would have included the detainer papers) and did nothing either to change the trial date even after the court learned on its own that the case involved a detainer or to fix a proper date even when the prosecution was aware that the court mistakenly believed that the case was an Article III case with a longer period, this "inaction" did not satisfy its burden of compliance with the IAD.

With all due respect to the *Allen* court, in the abstract one is hard-pressed to understand how a defendant's agreement to a trial date beyond the statutory period does not "directly contribute" to the occurrence of the trial beyond that period. In any event, though, it is clear that what drove that court to its ultimate disposition was its frustration with and disapproval of the prosecution, which egregiously mishandled the case through a series of omissions and general neglect (which is in stark contrast to the case at bar, where there is no indication of any "confusion" about applicability of the IAD [the trial court had itself signed one of the detainer forms (App. 18)]). The *Allen* court clearly strained to reach the result it did by adding the aforementioned "causation" test to the waiver standard, since it wholly ignored its own pronouncement in a case decided just a

few years earlier (*Sevigny*, *supra*, 679 P.2d 1070) that a voluntary waiver of IAD speedy trial rights occurs if the defense freely acquiesces in a trial date beyond the statutory period (*id.*, at 1075). Indeed, in a post-*Allen* case the Colorado Supreme Court reiterated this same principle (*People v. Newton*, 764 P.2d 1182, 1187 [Colo. 1988]) while at the same time claiming that it had "adhered" to such in *Allen* (*id.*) *Newton* was a case in which the defense had stood silent when the trial date was set, and the court noted that there was no indication that the defense had taken any "affirmative action" to "manifest approval of the trial date" (*id.*, at 1188 & n.5 [emphasis added]). Surely had the trial date been proposed to the defense and they had expressly agreed to such - as in the case at bar - the *Newton* court would have found such to be approval via affirmative action and thus waiver.

Not surprisingly, *Allen* itself was not a unanimous decision, and the dissenting Justices believed that a waiver had occurred. They noted that the majority equated "freely acquiescing in a trial date" with the "affirmative conduct" necessary to entail waiver, and yet although the defendant there had twice acquiesced in an an untimely trial date the majority still declined to find waiver (*Allen*, 744 P.2d at 79 [Vollack and Rovira, JJ., dissenting]). In the view of the dissent, "a defendant should not have the right to participate in the setting of the trial date beyond the speedy trial period and then claim a violation of the speedy trial provision" (*id.*, at 80).

Other cases in which courts have declined to find waiver have involved a defendant's silence in the face of the court's setting of a trial date. The general rationale of these cases is that "mere silence" cannot constitute waiver and there is no obligation of a defendant to object to an untimely trial date since the burden of compliance with the IAD is on the

prosecution (*e.g.*, *Roberson v. Commonwealth*, 913 S.W.2d 310 [Ky. 1994]; *State v. Dolbeare*, 140 N.H. 84, 663 A.2d 85 [N.H. 1995]; *State v. Edwards*, 509 So.2d 1161 [Fla. Dist. Ct. App. 1987]; *Smith*, *supra*, 686 S.W.2d 543; *State v. Arwood*, 46 Or. App. 653, 612 P.2d 763 [Or. Ct. App. 1980]; *Commonwealth v. Thornhill*, 411 Pa. Super. 382, 601 A.2d 842 [Pa. Super. Ct. 1992]; *accord*: *Birdwell*, 983 F.2d at 1340; *Brown*, 706 F.2d at 907). Whatever may be said of such analysis, and while under this view silence, from a defendant's standpoint, is indeed golden, silence is still silence and not, e.g., express agreement to/ approval of a proposed trial date. Webster's defines "silence" as "the state of keeping or being silent", i.e., "making no utterance", or "forbearance from speech" (Webster's Third New International Dictionary 2116-2117 [3rd ed. 1993]). Respondent here did not "stand silent" while a trial date was "set" by the court, and no amount of linguistic gymnastics can change this simple fact. Indeed, some of the same courts which hold that silence is not waiver have recognized the distinction between silence and express agreement (*e.g.*, *Smith*, 686 S.W.2d at 547-548 [delay resulting from defendant's agreement is excludable as waiver; also citing with approval case holding that express consent to continuance is excludable]; *Arwood*, 46 Or. App. at 657, 612 P.2d at 765 [consent is not silence but must be express]; *see also*, *Dolbeare*, 140 N.H. at 87, 663 A.2d at 86 [no indication that court held formal hearing in presence

of defendant or his counsel when it set trial date[5]]).

Other courts, however, have concluded that a defendant's failure to object to an untimely trial date is waiver (*e.g.*, *Drescher v. Superior Court*, 218 Cal. App. 3d 1140, 267 Cal. Rptr. 661 [Cal. Ct. App. 1990]; *Scrivener v. State*, 441 N.E.2d 954 [Ind. 1983]; *Schmidt*, *supra*, 84 Haw. 191, 932 P.2d 328; *State v Suarez*, 681 S.W.2d 584 [Tenn. Crim. App.1984], *overruled on other grounds in State v. Moore*, 774 S.W.2d 590 [Tenn. 1989]; *see also*, *Jones*, 197 Mich. App. at 81-82, 495 N.W.2d at 161 [noting that while defendant agreed to trial date he also did not object to such]; *State v. Brown*, 118 Wis. 2d 377, 386, 348 N.W.2d 593, 598 [Wis. Ct. App. 1984] [defendant's request for trial date anytime in month during which IAD time limit would expire and failure to object to date after the run date constituted waiver]; *Dolbeare*, 140 N.H. at 88-89, 663 A.2d at 87-88 [Thayer, J. and Brock, C.J., dissenting]; *McGann*, *supra*, 126 N.H. 316, 493 A.2d 452). Some of these courts equate failure to object with acquiescence [*e.g.*, *Drescher*, 218 Cal. App.3d at 1148, 267 Cal. Rptr. at 666; *Pethtel v. State*, 427 N.E.2d 891, 895 [Ind. Ct. App. 1981]; *see also*, *Allen*, 744 P.2d at 79 [Vollack and Rovira, JJ., dissenting]; *Thornhill*, 411 Pa. Super. at 389, 601 A.2d at 846, [Popovich, J., dissenting]; *State v. Garmon*, 972 S.W.2d 706,

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5 *Dolbeare* (*supra*) is similar to *People v. Allen* (*supra*) in that it was a split decision, with the dissent believing there was waiver and the majority decision appearing to conflict with recent precedent from the same court (*State v. McGann*, 126 N.H. 316, 493 A.2d 452 [N.H. 1985], in which the court cited approvingly an Indiana case holding that a defendant's failure to object to an untimely date constitutes waiver and in the case before it found that the defendant's silence as to whether to proceed with trial or to delay it was waiver).

711 [Tenn. Crim. App. 1998]). In *Reid v. State* (670 N.E.2d 949, 952 [Ind. Ct. App. 1996]) the court explained that while the defendant still had until the expiration of the time period to object "he sat idly by and did nothing" until after the expiration of the period (and shortly before trial) when he moved to dismiss, reflecting "a calculated and strategic ploy" to obtain dismissal, which the court declined to permit. Courts are certainly justified in disapproving conduct which amounts to "sandbagging" (*see, e.g., Freytag v. Commissioner*, 501 U.S. 868, 895 [1991] [Scalia, O'Connor, Kennedy and Souter, JJ., concurring] [defining sandbagging as "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later - if the outcome is unfavorable - claiming that the course followed was reversible error"][emphasis added]; *Wainwright v. Sykes*, 433 U.S. 72, 89 [1977], *reh. denied* 434 U.S. 880 [1977]).

This waiver-by-failure-to-object rule was applied by the Indiana Supreme Court in another case, *Reed v. State* (491 N.E.2d 182 [Ind. 1986]), which ultimately made its way to this Court on federal habeas review (*Reed v. Farley, supra*, 512 U.S. 339). The issue addressed by this Court was the availability of habeas review of IAD claims and the Court found such generally unavailable; thus it did not directly consider the substantive underlying issue of waiver vis-a-vis a defendant's role in the setting of a trial date. Justice Ginsburg, with the Chief Justice and Justice O'Connor joining, found that because the defendant had obscured the IAD's time prescription and avoided clear objection until the clock had run there was no cause for collateral review since there was merely an unwitting judicial slip, without aggravating circumstances, which did not rise to the level of a fundamental defect resulting in a miscarriage of justice or an omission inconsistent with the

rudimentary demands of fair procedure (*id.*, at 348-349). This was so even though the defendant had mentioned the IAD's prescription on trial commencement (this was an Article IV case [120 days]) in a number of motions he had filed prior to the expiration of the period; however, he did not refer to the specific provision at issue (Article IV[c]) or to the trial date previously set (*id.*, at 343-344). While Justice Ginsburg did not explicitly use the term "waiver" (although she did discuss the defendant's conduct in terms of "procedural default") Justices Scalia and Thomas (concurring in part and in the judgment) expressly characterized the defendant's conduct as waiver (*id.*, at 356-357). The dissenting Justices, however, were of the view that although not necessarily required to do so the defendant had repeatedly attempted to invoke the IAD protections in his written motions prior to expiration of the 120-day period (e.g., by requesting that trial be held within IAD guidelines, claiming that the state was forcing him to be tried beyond the IAD time limits and mentioning the "approaching" IAD limits). Relying on *Mauro* (436 U.S. at 364-365), in which the Court found that the defendant had not waived his IAD rights, even though he had failed to invoke the IAD in specific terms, where he persistently requested a speedy trial and asserted that the delay was causing him to lose privileges at his prison, the *Reed* dissenters concluded that the defendant had not waived or defaulted his IAD claim (*id.*, at 370-372).

Here in stark contrast respondent, after his initial request for disposition of the detainer charges while imprisoned in Ohio, never made any mention whatsoever of the IAD or even general speedy trial concerns; instead, while the statutory period was still running he expressly agreed to a trial beyond the period, thus ensuring a "violation", and only when the period had run did he then raise an IAD claim and seek

dismissal. Thus even under a more restrictive view of waiver one should have no difficulty concluding that the course taken by respondent here precludes him from obtaining a windfall of dismissal (with prejudice) of the charges.

However, a choice between these competing views as to whether a defendant must object to an untimely trial date need not be made because as repeatedly emphasized the case at bar does not involve silence but instead expression. The trial court here did not tell the parties what the trial date was and then simply leave them to whatever comments they desired to make (if any). Instead, the court merely proposed a particular date and expressly sought the parties' positions with respect to such. Defense counsel had every opportunity for input into the trial date determination. In fact, the proposal did not even come directly from the court but instead the prosecutor, who stated that he believed that the court "may have preliminarily discussed" the particular date. Thus defense counsel's express agreement when asked if the proposed date was acceptable cannot be treated as "silence" in the face of the court's "setting" of a trial date.

Respondent has suggested that defense counsel's agreement to the trial date was motivated by concerns of "civility" and "politeness", implying that the court "forced" the trial date on counsel, who had no choice but to accept lest he incur the court's wrath. However, such a claim is flatly refuted by the record, which instead shows that the court was quite solicitous of both sides. Indeed, as previously noted it was the prosecutor (who in fact was a stand-in for the assigned prosecutor, who was on trial elsewhere) who did most of the talking, mentioning that a "preliminarily discussed" date of May 1st was acceptable to the trial prosecutor, with the court then merely asking, "How is that with defense counsel?" Also,

respondent's argument in this regard suggests that the result would be just the opposite (i.e., he would not prevail) if indeed the prosecutor was the one to propose the date (since obviously even respondent would not contend that he would have felt constrained to accept such out of "fear" of or to be "polite" to the prosecution). This means that if the prosecutor in the colloquy here had merely deleted reference to "the court" in mentioning the proposed date this would be an entirely different case, which clearly makes no more sense than the view that the waiver issue turns on who speaks first (*see*, pp. 10-11, *supra*).

Beyond this, though, agreement is agreement and the reason for such is irrelevant; otherwise, a party (be it either side, as this principle cuts both ways) can (and will) always manufacture some after-the-fact explanation for their conduct in an effort to avoid the natural consequences of such. That this is so is evidenced here by defense counsel's reply to the People's response to his motion to dismiss (App. 53-54), where after the People emphasized counsel's agreement to the trial date he attempted to prop himself up by claiming that he was ready, willing and able to try the case at any time, which amounted to nothing more than post hoc rationalization.[6] Such is entitled to no more consideration than respondent's speculative, nonrecord references to such subjective concepts as the "personality" or "demeanor" of the court or the

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6 Although it must be noted that even then counsel stated that he had told the court's secretary that "any date in . . . January or February [was] acceptable" (App. 53-54), and in fact "any date in February" would have still been beyond the 180-day period (*see*, p. 2, *supra* [trial court found that at time trial date was set on January 9, 1995 there were 13 days left in the 180-day period (the correct figure was 19 days]).

"atmosphere" of the courtroom. Furthermore, at the same time counsel was attempting to "explain away" his agreement and avoid the fair consequences of such he also acknowledged that in agreeing to the trial date he was representing to the court that there was "no barrier" to trying the case on that date (App. 53 [emphasis added]).

Respondent has also suggested that part of the waiver test entails determining whether a delay "benefits" the defendant. However, no case requires such as a distinct and necessary component of waiver, and in any event when a defendant has expressly agreed to a delay it must be presumed that he did so for his own purposes, i.e., that the defendant deemed such to be to his benefit; otherwise, he would not have agreed to it. The relative "size" or worth of the benefit is irrelevant. Once again, any claim that a benefit to respondent was absent here is wholly unsupported; there was nothing on the record at the time the trial date was discussed indicating that respondent wanted an earlier trial date and/or that the time period between then and the agreed-upon date did not inure to respondent's benefit (by, e.g., at a minimum giving him more time to prepare for trial). In such instances there is no occasion to look beyond the agreement for an actual explication of the benefit(s). Indeed, at no time has respondent even alleged, let alone established, any prejudice whatsoever as a result of holding the trial a few months beyond the statutory period.

At bottom this case is a simple one. Respondent initially requested disposition of the detainer charges, triggering a statutory period within which trial was otherwise to be held. From respondent's initial appearance in court following his transfer the People were ready for trial and remained ready, never requesting any continuances. Prior to expiration of the statutory period a trial date outside the period was proposed and

respondent explicitly agreed to such. As the trial court expressly stated, trial could have been held within the period but such became unnecessary with respondent's assent.

To hold that a defendant can demand a trial within 180 days and then expressly agree to hold the trial beyond 180 days and still claim a right to discharge "borders on the ludicrous" (*Sampson*, 191 Cal. App. 3d at 1416, 237 Cal. Rptr. at 103, *quoting Russell v. State*, 624 S.W.2d 176, 179 [Mo. Ct. App. 1981]) and would sanction "manipulative abuse of the system" (*State v. Fuller*, 560 N.W.2d 97, 99 [Minn. Ct. App. 1997]). A defendant cannot be permitted to cause or contribute to, either unilaterally or through affirmative collaboration, an error which thereby allows him to wholly evade prosecution. The IAD, while providing the prisoner with a procedure for bringing about a prompt test of the substantiality of detainers placed against him, "gives him no greater opportunity to escape a conviction" (Council of State Governments, Suggested State Legislation Program for 1957, pp 76-77, 78 [1956]; S. Rep. No. 91-1356 [1970] *reprinted in* 1970 U.S.C.C.A.N. 4865).

CONCLUSION

The order/judgment of the New York Court of Appeals should be reversed and respondent's murder and robbery convictions reinstated.

Respectfully submitted,

HOWARD R. RELIN
District Attorney of Monroe County
Counsel for Petitioner
Suite 832, Ebenezer Watts Building
47 S. Fitzhugh Street
Rochester, New York 14614
(716) 428-5680

Of Counsel:

Robert Mastrocola

Robert Mastrocola,
Assistant District Attorney

(1)

No. 98-1299

In The

Supreme Court of the United States

THE STATE OF NEW YORK,

Petitioner,

v.

MICHAEL HILL,

Respondent.

On Writ Of Certiorari To The
New York State Court Of Appeals

BRIEF FOR RESPONDENT

EDWARD JOHN NOWAK
Counsel of Record
Monroe County Public Defender
Counsel for Respondent

10 North Fitzhugh Street
Rochester, New York 14614
(716) 428-5531

Of Counsel:

BRIAN SHIFFRIN
First Assistant Public Defender

STEPHEN J. BIRD
Assistant Public Defender

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Was the New York Court of Appeals correct in holding that no waiver of the time requirements imposed by the Interstate Agreement on Detainers (IAD) was effected by defense counsel's concurrence with the court's setting of a trial date beyond the 180-day time period, where the IAD, enacted for the benefit of society and the individual prisoner, contains tolling provisions which reflect a congressional intent to limit the circumstances in which its time requirements may be extended?

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STATEMENT OF THE CASE

Michael Hill[1] was serving a sentence of imprisonment in the State of Ohio when, on January 4, 1994, he was served with notice that he was being charged with murder and robbery in the Town of Gates, New York (*see* Appendix, hereinafter "A," at 3-6). On that date, he was also notified of his rights under the Interstate Agreement on Detainers (IAD) (A at 3-6). *See* N.Y. Crim. Proc. Law § 580.20. He then requested, in writing, that he be brought to trial within 180 days on the outstanding charges (A at 7-10).

A series of forms[2] were completed in relation to this written request by Mr. Hill. The prosecuting attorney and

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[1] Respondent has been ascribed a number of different names, i.e., Michael Hill, Dwain Reid, and Leroy Foster. In the case at bar he was prosecuted by Indictment Number 160/94, the caption of which read People of the State of New York versus Michael Hill a/k/a Dwain Reid. After conviction, the proceedings continued (including the order granting certiorari by this Court) under the name Michael Hill. Accordingly, Michael Hill is the name used in this brief.

[2] The forms referred to are captioned at the top "Agreement on Detainers," and included the form signed by Mr. Hill (who was incarcerated in Ohio under the name "Leroy Foster," which explains the forms' reference to Mr. Hill by that name), the document notifying the Monroe County District Attorney of Mr. Hill's request, the form sent by the prosecuting attorney (Gregory Huether, Esq.) to New York's IAD administrator indicating that New York was taking custody of Mr. Hill and trying him in accordance with the IAD, and the form signed by Mr. Huether and the trial judge advising the Ohio prison where Mr. Hill was held that temporary custody of Mr. Hill was accepted and that they intended to bring Mr. Hill to trial in accordance with IAD, Article III (A at 3-20).

the trial judge signed these forms, in which the prosecutor agreed to bring Mr. Hill to trial within the time requirements of the IAD (A at 16-18).

In its decision denying Mr. Hill's motion to dismiss for violation of the IAD's time requirement, the trial court excluded various time periods between January 4, 1994 and January 9, 1995 because they fit within tolling provisions expressly set forth in the IAD. *People v. Reid*, 627 N.Y.S.2d 234 (N.Y. Co. Ct. [Monroe Co.] 1995). At a court appearance on January 9, 1995, Mr. Prosperi, the prosecutor who appeared on behalf of Mr. Huether, the prosecutor assigned to prosecute Mr. Hill, explained that Mr. Huether was engaged in a trial. Mr. Prosperi then stated that Mr. Huether had told him *"that the Court was to set a trial date today*. I believe the Court may have had preliminarily discussed a May 1st date" (emphasis added). Despite having acknowledged in writing their respective obligations to comply with the time requirements of the IAD, neither the prosecutor nor the court ever mentioned that, given the non-excludable time which had already passed, the IAD required Mr. Hill's trial to begin by January 28, 1995. Rather, the prosecutor only stated that "Mr. Huether says that [the May 1st date] would fit in his calendar." After the Court learned that the May 1, 1995 date "would fit the Assistant District Attorney's calendar," the Court asked how that date was with defense counsel. Defense counsel simply replied, "[t]hat will be fine, your Honor" (A at 35). No cause was placed on the record as to why an earlier trial date was not possible or why the case needed to be adjourned 112 days.

What transpired almost six months earlier on July 20, 1994 is particularly revealing in view of the court's and

prosecutor's actions at the January 9, 1995 appearance when Mr. Hill's trial date was set. On July 20, 1994, the trial prosecutor sought more time to reply to defense counsel's omnibus motion stating, "I just completed a trial yesterday and have not had the opportunity to draft a written response." Defense counsel replied that "[m]y client and I have no objection to an adjournment for that, Your Honor."[3] Significantly, when the court granted the prosecutor's request for a continuance for additional time to prepare his motion response and for the argument of motions, the court stated, for the record, that the adjournment was "with the consent of both attorneys" (A at 40). The court ultimately found, in its written decision denying the defense motion to dismiss for violation of the IAD, that such continuance was part of the time period excludable from the 180-day calculation pursuant to the tolling provisions of IAD, Article III(a) and Article VI. *People v. Reid*, 627 N.Y.S.2d 234, 236 (N.Y. Co. Ct. [Monroe Co.] 1995). It is also significant to note that the court did not find that there was a waiver of IAD rights regarding this time period. In contrast, at the January 9, 1995 appearance, the trial court did not indicate for the record that the 112-day continuance for the trial of this matter was "with the consent of both parties" as it had on July 20, 1994. Nor did the court find that this period was excludable under a tolling provision of the IAD.

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[3] This statement by defense counsel belies the accusations by the Petitioner that defense counsel was "sandbagging" or otherwise resorting to "gamesmanship." *See* Brief for Petitioner, at 11, 20-22; Brief for United States as Amicus Curiae, at 17, 20-21 and n. 12.

On April 17, 1995, defense counsel brought a motion to dismiss this indictment pursuant to the IAD based upon the State's failure to bring Mr. Hill to trial within the required 180 days (*see* Defendant's Notice of Motion, filed April 17, 1995) (A at 21-25).

The prosecutor's reply motion claimed that his exercise of due diligence in trying to comply with Mr. Hill's demand for resolution of the charges against him, Mr. Hill's bringing of motions, and that defense counsel's response of "fine" to the court-proposed trial date constituted "consent" to the delay after January 9, 1995, and thus demonstrated "good cause shown," pursuant to Article III(a) of the IAD (A at 26-32).

Defense counsel responded to the prosecutor's reply motion that his response of "fine" to the court-proposed trial date was merely an indication "that there was no barrier to proceeding on that date" (A at 53-54). In this responding affirmation, defense counsel affirmed that he had been contacted "[i]n the latter part of December 1994" by the trial court's secretary, who had asked if the defense could be ready to proceed to trial in January or February of 1995. Defense counsel affirmed that he had informed the court's secretary that any date in January or February of 1995 would be acceptable, and further affirmed that after December 5, 1994, the defense had never indicated a lack of readiness for any trial date for this indictment, suggested or requested a trial date beyond the 180-day limit, or waived the 180-day limit. Defense counsel was ready and able to try the case in January or February of 1995, had advised the court's secretary of such, and "specifically denie[d] that portion of paragraph 9 of the prosecution's Reply to Notice of

Motion that states the May 1, 1995 trial date 'was specifically agreed upon by the defense after the Court and both counsel reviewed their prospective schedules and availability in 1995' " (A at 53-54). The prosecutor never contested defense counsel's statements in the responding affirmation.[4]

The trial court denied defense counsel's motion to dismiss the indictment pursuant to the IAD, stating that the issue turned on the ninety-eight-day period from January 9, 1995, the date the court scheduled Mr. Hill's trial, to April 17, 1995, when defense counsel moved to dismiss the indictment based on Mr. Hill not having been brought to trial within 180 days. *People v. Reid*, 627 N.Y.S.2d 234, 236 (N.Y. Co. Ct. [Monroe Co.] 1995). The trial court held that defense counsel's acquiescence to the May 1, 1995 date, set by the court, was an "explicit agreement to the trial date set beyond the 180-day statutory period [and] constituted a waiver or abandonment of defendant's rights under the IAD." *Id.* at 237. Further, the court wrote that "[h]ad counsel raised an objection to the proposed trial date, the Court had been in a position to set the date within the 180-day statutory period." *Id.* at 237. The trial court did not make a finding that "good cause" had been shown for the continuance of Mr. Hill's case from January 9, 1995 to May 1, 1995. Further, and equally important, the court did not make any findings that the length of the adjournment was either necessary or reasonable.

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[4] Therefore, pursuant to New York State law, these facts are "deemed to be conceded." *People v. Gruden*, 42 N.Y.2d 214, 216-217 (1977).

After deliberations, the jury found Mr. Hill guilty of second degree felony murder and first degree robbery. On June 8, 1995, the court sentenced Mr. Hill to concurrent sentences of twenty-five years to life for murder and eight and one-third to twenty-five years for robbery. These sentences were to run consecutively to the Ohio sentence Mr. Hill was already serving. The Supreme Court of the State of New York, Appellate Division, Fourth Department affirmed Mr. Hill's conviction "for reasons stated in decision at Monroe County Court. . . . " *People v. Hill*, 668 N.Y.S.2d 126 (N.Y. App. Div. [4th Dept.] 1997).

The New York State Court of Appeals reversed the order of the Appellate Division and dismissed the indictment holding,

> where, as here, the defendant simply concurred in a trial date proposed by the court and accepted by the prosecution, and that date fell outside the 180-day statutory period, no waiver of his speedy trial rights was effectuated. Defendant's mere concurrence in the suggested trial date did not constitute an affirmative request for a trial date beyond the speedy trial period. Moreover, it is the burden of the prosecutor and the court to comply with the IAD's speedy trial requirements.

People v. Hill, 704 N.E.2d 542, 546 (N.Y. 1998).

Following the prosecutor's petition for writ of certiorari, Mr. Hill's response, and a reply by the Petitioner, this Court granted certiorari on May 17, 1999. This appeal follows.

SUMMARY OF ARGUMENT

Article III of the IAD imposes a strict 180-day deadline for the commencement of trial of a prisoner who has invoked its provisions. Congress has set forth the requirements that must be met before a continuance is excluded from IAD calculations by providing that only "necessary or reasonable" continuances granted for "good cause shown" in open court are excludable. As such, the continuances under the IAD are similar to those granted under the Federal Speedy Trial Act (FSTA) in that courts must apply the congressionally sanctioned test to determine whether a continuance, even one granted with the consent or concurrence of counsel, is to be excluded from its provisions. Given these provisions, waiver analysis should not override, but must complement, these congressionally enacted tests for tolling the statutory time period.

On January 9, 1995, when the May 1, 1995 trial date was set, neither the court nor the prosecutor acknowledged the State's obligation under the IAD. Instead, without providing any reason for delaying the start of Mr. Hill's trial an additional 112 days, the court proposed and the prosecutor agreed to that trial date. No good cause was set forth or found for this lengthy continuance. Defense counsel's ambiguous response of "fine" when asked by the court about the May 1, 1995 trial date does not constitute a basis for finding on this record either that it was a "necessary and reasonable" continuance granted upon "good cause shown" or for finding that Mr. Hill waived his right to even assert his speedy trial rights under the IAD. *United States v. Mauro*, 436 U.S. 340, 364

(1978), *aff'g United States v. Ford*, 550 F.2d 732 (2nd Cir. 1977).

Having failed to establish that this time period should be excluded under the statutory good cause test, the Petitioner argues that Mr. Hill waived his IAD rights. In order to make this argument, the Petitioner characterizes defense counsel's statement of "fine" as an "express agreement" which he argues transforms counsel's mere concurrence to a trial date proposed by the court into a waiver of Mr. Hill's IAD rights. First, the argument ignores the conclusion reached by the New York Court of Appeals that defense counsel merely concurred with the date proposed by the court. The Petitioner's argument also disregards the fact that many other federal statutes and rules – but not the IAD – expressly provide that consent automatically nullifies the statutory time periods set in those statutes and rules. Further, the Petitioner's argument ignores the holdings that consent to a continuance does not automatically nullify the time periods set by the FSTA, a statute similar in subject matter, purpose, and content.

The fact that a continuance was granted after the concurrence or consent of the defendant does not necessarily establish either "good cause" for the continuance or waiver. When Congress intends for consent to *per se* toll or waive a time period, it expressly so provides. Thus, Congress has enacted numerous statutes and rules which expressly provide that the time periods set forth therein are inapplicable upon either a finding of "good cause . . . or consent." By contrast, the IAD provision authorizing the tolling of time periods for continuances granted upon "good cause" does not also provide for

automatic tolling on "consent." The decision of Congress not to include any language found in these many congressionally passed laws and rules is strongly indicative of a congressional rejection of a rule that consent automatically tolls or waives the time periods of the IAD. To hold otherwise would result in a judicial circumvention of the congressional intent in enacting the IAD.

As with the FTSA, the specific and limited provisions in the IAD for excluding time periods mean that waiver should be found only where the actions of the defendant clearly require a finding that the defendant relinquished his right to assert violations of the IAD. The Petitioner fails to acknowledge this distinction between the applicability of the IAD's "good cause" tolling provision and the test to be applied for determining whether a defendant has waived his IAD claim.

An express request to be treated contrary to the provisions of the IAD, or the entry of a guilty plea which gives up the right to a trial, may be held to constitute a waiver of the right to complain of a violation of the IAD. However, mere concurrence to a court-suggested date should not be found to constitute a waiver. Rather, such action should be viewed in the context of the IAD's tolling provisions, which exclude the time periods where "good cause" has been shown for necessary or reasonable continuances.

Such an analysis is very similar to that employed to determine whether the FSTA time periods should be tolled for a continuance to which the defendant consented. In such cases, consent is a factor to consider but it is not dispositive. Courts must ultimately determine

whether "the ends of justice" support the tolling. Similarly, the IAD time requirements may be tolled for "necessary or reasonable" continuances granted for "good cause shown" in open court. Consent should be one factor to consider in determining whether the provisions of the IAD be tolled but should not be dispositive.

The IAD is a plainly worded and deliberately forceful statute that is written in a manner which both provides concrete parameters while still giving member-states a degree of latitude by which to consider the totality of the circumstances presented by a particular case. In reviewing this New York State prosecution, the New York Court of Appeals recognized the State's failure to fulfill its responsibilities under the IAD. This holding of the Court of Appeals is in total harmony with congressional intent and with the language of the IAD and should not be overturned.

ARGUMENT

POINT I: THE NEW YORK COURT OF APPEALS WAS CORRECT IN HOLDING THAT DEFENSE COUNSEL'S CONCURRENCE WITH THE COURT'S SETTING OF A TRIAL DATE DID NOT WAIVE THE TIME REQUIREMENTS IMPOSED BY THE INTERSTATE AGREEMENT ON DETAINERS.

A. The IAD Places the Burden of Compliance on the Receiving State.

The IAD is a compact among forty-eight states, the District of Columbia, Puerto Rico, the Virgin Islands and the United States, and while "indeed state law, [it] is a

law of the United States as well."[5] *Reed v. Farley*, 512 U.S. 339, 347 (1994); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

The purpose of the Act, to which New York State and Ohio (the state from which Mr. Hill was transferred) are signatories, is to require the expeditious and orderly disposition of outstanding detainers based on untried indictments, informations or complaints in order to ease difficulties in securing the speedy trial of persons incarcerated in other jurisdictions. N.Y. Crim. Proc. Law § 580.20; *Carchman v. Nash*, 473 U.S. 716, 720 (1985); *Cuyler*, 449 U.S. at 438; *U.S. v. Mauro*, 436 U.S. 340, 356, 359-360 (1978). Acceleration of the disposition of the charges upon which the detainers are based benefits the public interest in a speedy trial as well as the interests of the prisoner. IAD, Article I; *Carchman*, 473 U.S. at 720; *Pitsonbarger v. Gramley*, 103 F.3d 1293 (7th Cir. 1996).

In an effort to assure that these important purposes are achieved, Congress drafted the IAD to expressly provide that it "shall be liberally construed so as to effectuate its purposes." IAD, Article IX.

Mr. Hill, who was incarcerated in Ohio on unrelated charges, made a written request for a final determination

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[5] The decision to join or remain a signatory to this agreement is made by each state, as evidenced by the fact Mississippi and Louisiana have chosen not be participates in the IAD. *Birdwell v. Skeen*, 983 F.2d 1332 n.4 (5th Cir. 1993). Further, member states retain the right to opt out of the IAD. *Bush v. Muncy*, 659 F.2d 402 n.11 (4th Cir. 1981) (the options available to states with respect to the IAD are to join "in substantially the form" of the Agreement; to decline to join at all; or completely to withdraw after having joined).

of all untried charges against him in New York, pursuant to Article III of the IAD[6] (A at 7-10). Properly notified of the demand, the State of New York accepted temporary custody of Mr. Hill, and the prosecutor agreed in writing to try him within the period specified by Article III(a) of the IAD (A at 16-18).

The principal sections of the IAD applicable to Mr. Hill's case (Articles III[a] and V[c]), codified in Section 580.20 of the New York Criminal Procedure Law, are as follows:

> [w]henever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint . . . he [the prisoner] shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition . . . ; provided that for good cause shown in open court, the prisoner or

[6] The Petitioner's veiled attempts to shift the burden of compliance to the defendant in Article III cases because, unlike Article IV situations, Article III is initiated by the defendant, is without merit. The statutory language only distinguishes between these two Articles in terms of the number of days in which a state must prosecute and in the requirements regarding waiver of extradition. The IAD clearly places the burden of compliance squarely upon the state pursuant to both Articles.

> his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
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> . . . [I]n the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

Accordingly, as a result of Mr. Hill's causing to be delivered to the court and prosecutor of New York a request for a final disposition of his New York charges, the prosecutor and the trial judge were statutorily bound to try Mr. Hill within 180 days or the New York charges against him would be dismissed with prejudice.

"Congress spoke with unmistakable clarity when it prescribed both the time limits for trying a prisoner whose custody was obtained under the IAD and the remedy for a violation of those limits." *Reed v. Farley*, 512 U.S. at 367 (Blackmun, J., dissenting). Other than making a written request to invoke the IAD pursuant to Article III, the IAD places no affirmative duty on the defendant to alert the court to the provisions of the Act. *See, e.g., Reed*, 512 U.S. at 368 (Blackmun, J., dissenting); *Brown v. Wolff*, 706 F.2d 902, 907 (9th Cir. 1983); *People v. Allen*, 744 P.2d 73, 77 (Colo. 1987). Rather, the "statute unambiguously directs courts to dismiss charges when the time limits are breached. . . . This arguably puts the responsibility on the courts and States to police the applicable

time limits." *Reed*, 512 U.S. at 370 (Blackmun, J., dissenting). "This is a reasonable choice for Congress to make" as "[j]udges and prosecutors are players who can be expected to know the IAD's straightforward requirements and to make a simple time calculation at the outset of the proceedings." *Id.* at 370-371 (Blackmun, J., dissenting); *see also United States v. Eaddy*, 595 F.2d 341, 345 (6th Cir. 1978). As noted by the Sixth Circuit Court of Appeals, to hold otherwise would shift the burden from state officials where Congress very deliberately placed it. *United States v. Eaddy*, 595 F.2d at 344; *see also Allen*, 744 P.2d at 77; *Roberson v. Kentucky*, 913 S.W.2d 310, 314 (Ky. 1994).

Under Article III of the IAD, a defendant has a single responsibility to notify prison officials of his request to be brought to trial on the charges on which the out-of-state detainer is based and to thus demand treatment in accordance with the IAD. IAD, Art. III(a) and (d); *Carchman v. Nash*, 473 U.S. at 721; *Fex v. Michigan*, 507 U.S. 43, 58 (1993) (Blackmun, J., dissenting).

"Quite simply, Congress has determined that a receiving state must try a defendant within [the statutorily provided time-frame] or not at all . . . a remedy rarely seen in criminal law." *Reed v. Farley*, 512 U.S. at 367-368 (Blackmun, J., dissenting); *Brown v. Wolff*, 706 F.2d 902 (9th Cir. 1983); IAD Article V(c). Thus, the failure of the state to comply with the IAD results in the dismissal of the accusatory instrument without regard to prejudice. IAD, Article III(d). The only exceptions set forth in IAD to the state's obligation to timely try a prisoner who requests a trial pursuant to Article III of the IAD are the

provisions stated in the IAD for the tolling of the statutory time limit. Specifically, exceptions exist only if the prisoner escapes, is unable to stand trial, or where, in open court, a continuance is granted for "good cause shown." IAD, Article III(a) and (f) and VI(a).

Violations of speedy trial statutes generally have been held to be preserved for review as long as a defendant makes a motion before trial for dismissal based on such violation. In instances of alleged evidentiary errors, a contemporaneous objection requirement is generally imposed. By contrast, no such objection is usually required to alert the court or prosecutor to potential violations of speedy trial statutes. *See, e.g., People v. Beyah*, 367 N.E.2d 1334 (Ill. 1977); *People v. Cortes*, 604 N.E.2d 71 (N.Y. 1992); *Commonwealth v. Yant*, 461 A.2d 239 (Pa. Super. 1983).

The IAD contains no language which would indicate that there is a contemporaneous objection requirement. Furthermore, in *United States v. Mauro*, 436 U.S. 340, 364 (1978), *aff'g United States v. Ford*, 550 F.2d 732 (2nd Cir. 1977), this Court sustained respondent Ford's IAD claim despite the fact that Mr. Ford neither objected to the continuances or delays on the basis of the IAD nor moved to dismiss pursuant to the IAD.

In *Reed v. Farley*, 512 U.S. 339, this Court held that where a defendant in a collateral proceeding failed to timely object to a violation of the IAD, and did not make a showing of prejudice, he could not obtain relief by way of a federal habeas corpus proceeding. Four justices of this Court would have granted habeas corpus relief for a violation of the IAD to which there was no objection.

(Unlike *Reed*, the case at bar is before this Court on direct review.) Indeed, had this Court intended to interject into the language of the IAD a contemporaneous objection requirement, its extended analysis of the availability of review by means of a writ of habeas corpus would have been rendered unnecessary, as the Court's ruling could have simply rejected Mr. Reed's claim based solely upon the lack of objection. As a result, it can be fairly inferred from this Court's holding in *Reed* and the clear language of the IAD itself that an objection to the setting of a trial date beyond the IAD's time limits is not required for a case being reviewed on direct appeal. *See Reed*, 512 U.S. at 370 (Blackmun, J., dissenting).

After the IAD is triggered by a defendant's written request, the state must strictly comply or the indictment against the defendant will be dismissed with prejudice. In the case at bar, Mr. Hill triggered the statute by demanding speedy disposition of the charges against him pursuant to the IAD (A at 7-10). The State, as evidenced by forms signed by the prosecutor and trial judge, agreed to do so. Yet Mr. Hill was not timely tried and, as detailed below, no tolling provision recognized by the IAD – or otherwise – can explain or excuse the state's failure to honor Mr. Hill's statutory rights under the IAD.

B. The Continuance of this Case from January 9, 1995 to May 1, 1995 Was Not A Necessary or Reasonable Continuance Granted upon "Good Cause Shown" As Required by the IAD's Tolling Provision.

The IAD includes provisions which expressly exclude certain specified time periods from the time requirements

of the IAD. The test set forth in the IAD for determining whether a continuance should toll the 180-day time period for trying an Article III case is whether it was "necessary or reasonable" and was granted for "good cause shown" in open court. IAD, Article III(a). The only other provisions for tolling the statutorily prescribed time period within which to try a prisoner are where the prisoner escapes or is unable to stand trial.[7] Neither of these two provisions is applicable to the case at bar. *See* IAD, Articles III(f) and VI(a).

In order to determine the nature of waiver under the IAD – and therefore reach the specific question upon which certiorari was granted, i.e., whether defense counsel's alleged consent to a court-proposed court date constituted an "explicit agreement" which waived Mr. Hill's IAD rights – it is necessary to first examine the tolling provisions of the IAD.[8] Since the waiver doctrine should not conflict with or override the legislative intent of the IAD, *see, e.g, United States v. Mezzanatto*, 513 U.S. 196 (1995), the process of defining waiver under the IAD must start with a review of the congressionally enacted tolling provisions in the statute before reaching waiver

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[7] There has never been a claim by the State, nor a finding by a New York court, that Mr. Hill was unable to stand trial during the time period from January 9, 1995 until the filing of the motion to dismiss on April 17, 1995. That issue is, therefore, not before this Court.

[8] The Rules of this Court state that, "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14(1)(a).

analysis. As Congress explicitly enacted the tolling provisions in the IAD which unequivocally restrict the situations in which the state's burden is tolled, courts should not readily find waiver in those circumstances.

As set forth below, the Petitioner has never again raised the issue of "good cause" after the trial prosecutor's response to defense counsel's motion to dismiss for violation of the IAD. Therefore, the issue is deemed abandoned. As further set forth below, the prosecutor failed to comply with the procedural requirements of IAD, Article III(a) by never applying, in open court, for a "necessary or reasonable" continuance based upon a showing of "good cause," and the court never granted such a continuance.

The Petitioner has not pursued at any stage of the appellate process, including the petition for writ of certiorari and the brief on the merits to this Court, an argument that the "good cause" exception excused the delay after January 9, 1995. The only time the Petitioner asserted this claim was in response to defense counsel's motion to dismiss the indictment based upon the failure to comply with the IAD. It was only then that the trial prosecutor alleged in writing that the delay after January 9, 1995 should be considered a continuance for "good cause." Therefore, it is respectfully asserted that the Petitioner is now foreclosed from advancing the argument that "good cause" was shown for the continuance of January 9, 1995. *See, e.g., Bryan v. United States*, 524 U.S. 184 (1998); *Chandris v. Latsis*, 515 U.S. 347 (1995).

In the event this Court deems the issue not abandoned, it is urged that the January 9, 1995 continuance

did not satisfy the procedural requirements for tolling under IAD, Article III(a). The 112-day continuance granted by the trial court in this case was neither "necessary or reasonable" nor granted upon a showing of "good cause." When the court was setting Mr. Hill's trial date on January 9, 1995, the prosecutor asserted that May 1, 1995 "would fit" into the trial prosecutor's schedule (A at 35). He did not remind the court that the IAD time provisions, to which the prosecutor had agreed in writing to comply, required the trial to commence by January 28, 1995. No reason was given by the court or the prosecutor for delaying proceeding on this case for 112 additional days. It was only after, and in the context of the prosecutor stating that the May 1, 1995 date fit within the trial prosecutor's schedule, that the defense attorney was asked how that date was with him.

Clearly, the trial court never granted a continuance based upon "good cause," despite knowing of the tolling provision.[9] Accordingly, the procedural requirements of a continuance for "good cause shown," as plainly set forth in Article III(a), were not complied with by the prosecutor or trial court.

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[9] The court's knowledge of the IAD's provisions is evidenced by its acknowledgment of the provisions of the IAD (A at 18) and by the trial court's written decision denying Mr. Hill's motion to dismiss the indictment for failure to comply with the IAD, which tolled the clock during that time Mr. Hill brought motions because, in part, "the delay may be excluded as a 'necessary or reasonable continuance' under Article III." *Reid*, 627 N.Y.S.2d at 236. However, the court did not make the same finding regarding the January 9, 1995 continuance.

In response to the motion to dismiss, the prosecutor alleged three "substantive" claims in support of the contention that the time period after January 9, 1995 should be considered tolled based upon the "good cause" provision of the IAD. Specifically, the prosecutor alleged that "good cause" was established based upon: "due diligence" shown in trying to comply with the statute; motions brought by defense counsel; and defense counsel's alleged "consent" to the court-proposed trial date (A at 26-32). The prosecutor's contentions do not comport with the case law defining the "good cause" exception.

That the prosecutor showed "due diligence" in his efforts can only be expected of a prosecutor doing his job and is not grounds for additional time than that allowed by the statute. In fact, the prosecutor himself stated that the process of obtaining custody of Mr. Hill and arraigning him in New York took only sixty-seven of the 180 days allotted him by the IAD.

The prosecutor's next argument, that Mr. Hill's motions established good cause, is equally without merit. The delay caused by the filing of defense motions (from May 18, 1994 to December 5, 1994), a period properly excludable under law, *see, e.g., United States v. Cephas*, 937 F.2d 816 (2nd Cir. 1991), *was* excluded. *People v. Reid*, 627 N.Y.S.2d at 236. Even without that excluded time, the State failed to try Mr. Hill within the required 180 days.

The prosecutor's final argument that Mr. Hill consented to the court date later determined to be outside the IAD's time period similarly fails to establish a basis for finding "good cause." Defense counsel's statement of "fine" was indistinguishable from that of the prosecutor

uttered immediately before defense counsel's response. Arguably, it was this precise sequence of events which led the Court of Appeals to conclude that defense counsel "concurred" in the proposed date, as opposed to having "consented" to the date.

The Petitioner's argument that the substance and sequence of what attorneys say in the courtroom is irrelevant semantics ignores that the meaning and significance of words is determined by the context in which they are spoken (Brief for Petitioner at 10-11). A court seeking to determine whether there was good cause shown for a continuance must consider who asked for it, the reason for the request, the response of the opposing party, the impact on the case and on the criminal justice system, and, most importantly, in IAD cases such as that at bar, which party bears the burden of compliance under the statute.[10] Thus, the New York Court of Appeals was precise and accurate in describing the defense counsel's response to the trial date suggested by the court as counsel having "concurred" in the court's proposal.

However, even assuming, *arguendo*, that Mr. Hill's attorney "consented" to the proposed trial date, such consent should not result in a *per se* finding of "good

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[10] For instance, while there might not be good cause for delay where the continuance is due to court congestion, *Brown v. Wolff*, 706 F.2d 902, 906 (9th Cir. 1983); *Hammett v. McKenzie*, 596 S.W.2d 53 (Mo. Ct. App. 1980), or where requested by the prosecutor because the state has allocated insufficient funds to the prosecution, *cf. Mississippi v. Turner*, 498 U.S. 1306 (1991), there might be good cause when the continuance is requested by a defense attorney who needs time for discovery. *Dennett v. Maryland*, 311 A.2d 437 (Md. Ct. Spec. App. 1974).

cause." Rather, under the IAD, in contrast to numerous other federal statutes and rules, consent is not determinative of whether the failure to adhere to statutory time periods is excused. In numerous federal statutes and rules, set forth below, Congress has shown that it is quite capable of drafting a statute or rule which provides that a party's consent to be treated other than within the statutory time period necessarily and always excuses the non-compliance with the time period. In these statutes and rules, Congress has provided that time periods set forth therein are inapplicable either upon a finding of good cause or consent to non-compliance with the time period. The language in these statutes and rules separately excluding time because of "consent" makes the absence of "consent" language in the IAD significant because it illustrates legislative awareness that a party's consent does not necessarily establish "good cause" for a continuance. If "consent" *per se* constitutes "good cause," then use of the disjunctive in these statutes and rules is superfluous. Thus, these statutes expressly provide that consent automatically tolls time periods contained therein.

Examples of statutes and rules in which Congress has distinguished between "good cause" and "consent" include the following: 18 U.S.C. §§ 1467, 1963, 2253; 21 U.S.C. § 853 (Each of these sections separately provides that "[s]uch a temporary order shall expire . . . unless extended for good cause shown . . . or unless the party against whom it is entered consents to an extension. . . . "); 15 U.S.C. §§ 78k-1, 78o, 78o-4, 78o-5, 78ccc, and § 80b-3 (Each of these sections separately provides that "[t]he Commission may extend the time for the conclusion of such proceedings for up to . . . days if it finds good cause

for such extension and publishes its reasons for so finding or for such longer periods as to which the applicant consents."); Fed. R. Civ. P. R. 65 ("Every temporary restraining order . . . shall expire by its terms . . . unless . . . for good cause shown, is extended . . . or unless the party against whom the order is directed consents that it may be extended. . . . ").[11]

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[11] Other examples are: 15 U.S.C. § 1116 ("That date shall be not sooner than ten days . . . unless the applicant shows good cause . . . or unless the party against whom such order is directed consents to another date. . . . "); 15 U.S.C. App., 37 C.F.R. § 2.102 (" . . . extensions of time may be granted . . . for good cause. In addition, extensions [of greater than 120 days] will not be granted except upon . . . consent . . . or . . . showing of extraordinary circumstances. . . . "); 28 U.S.C. § 140 ("Any district court may . . . with the consent of the judicial council of the circuit, pretermit any regular session of court for . . . good cause."); Ct. Cl. R. 65 ("Every temporary restraining order . . . shall expire by its terms . . . unless within the time so fixed the order, for good cause shown, is extended . . . or unless the party against whom the order is directed consents. . . . "); Fed. R. Crim. P. 5 ("With the consent of the defendant and upon a showing of good cause . . . time limits may be extended. . . . "); Ct. Int'l Trade R. 43 ("Timely service of . . . documents may be waived or the time extended . . . upon consent or by the court for good cause shown."); Ct. Int'l Trade R. 65 ("Every temporary restraining order . . . shall expire within such time . . . as the court fixes, unless . . . for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended. . . . "); *see also* T.C. R. 74 ("Upon consent of all the parties to a case, and within the time limits . . . a deposition may be taken. . . . Unless the Court shall determine otherwise for good cause shown, the taking of such a deposition will not be regarded as sufficient ground for granting a continuance. . . . ").

These examples demonstrate that when Congress intends that "consent" automatically results in the tolling of time periods, it drafts a statute accordingly. Yet, in contrast to the above-cited statutes and rules, the IAD, which does not contain the "good cause . . . or consent" disjunctive language, was drafted so as not to automatically require a tolling of its time provisions when there was consent to a continuance.

Similarly, in determining motions to dismiss under the FSTA (18 U.S.C. 3161 *et seq.*), courts considering whether the FSTA's tolling provision for the "ends of justice" applies, *see* 18 U.S.C. § 3161(h)(8)(A), have held that "consent" is only a factor to be considered in granting a continuance and not determinative. *See* Point I(C)(1)(b). That is, a defendant's consent alone does not toll the time limits. Rather, consent must be weighed by the court in applying the "ends of justice" test in order to make sure that the determination falls within a statutory exception and that the request outweighs the public's and defendant's interest in a speedy trial. *See, e.g., United States v. Barnes*, 159 F.3d 4, 12-13 (1st Cir. 1998) (fact that defense has requested or consents to a continuance not sufficient to toll time limits; whether continuance is lawful turns on whether court abused its discretion in granting the adjournment); *United States v. Staton*, 94 F.3d 643 (4th Cir. 1996) (defense motion for continuance only excludable if judge granted continuance based on findings that ends of justice served); Robert L. Misner, *Amended Speedy Trial Act Guidelines* (1981) ("The fact that the defendant has requested the continuance or consents to it is not in itself sufficient to toll the operation of the time limits.").

In determining whether "good cause" was shown for a continuance in a case subject to the IAD, courts have correctly considered the totality of the circumstances. *See, e.g., State v. Livernois*, 934 P.2d 1057 (N.M. 1997); *State v. Lippolis*, 262 A.2d 203 (N.J. 1970). A defendant's concurrence in a court proposed continuance is only a factor to consider. In this case, where there was no reason given by the court or the prosecutor for the lengthy continuance, defense counsel's concurrence to the court setting of a trial date does not even approach the tolling provision's requirement of "good cause shown."

C. Defense Counsel's Reply of "Fine" to a Court-Proposed Trial Date Did Not Waive Respondent's Rights Under the Provisions of the IAD.

1. Introduction.

This Court has previously rejected arguments by the government that a defendant waived his IAD rights by failing to object to delays which violate the IAD or by failing to move for dismissal of a prosecution on the basis of the violation of the IAD. *United States v. Mauro*, 436 U.S. 340, 364 (1978), *aff'g United States v. Ford*, 550 F.2d 732 (2nd Cir. 1977). Thus, this Court affirmed a dismissal of a conviction due to non-compliance with the IAD time requirements in a case in which a defendant neither objected to delays on the basis of the IAD nor made a motion to dismiss for failure to comply with the IAD, but rather merely sought dismissal on constitutional speedy

trial grounds.[12] *Mauro*, 436 U.S. at 364. The Court's determination in *Ford* that a waiver did not occur is consistent with Congress' intent that the IAD be "liberally construed to effectuate its purposes." IAD, Article IX. While clearly rejecting a broad application of waiver in IAD cases, the *Mauro* decision did not state, when, if ever, waiver of IAD rights should be found.

Waiver, as opposed to the determination by the court of a continuance for "good cause," is the intentional relinquishment of a known right. *See United States v. Olano*, 507 U.S. 725, 733 (1993). Analysis of waiver principles in an Article III case should begin with the recognition that it is the defendant who starts the procedure by affirmatively invoking his IAD rights.[13] In this case, Mr. Hill invoked his rights under Article III of the IAD (A at 7-10), which was his sole obligation before the burden of compliance shifted in full to the state to timely try him.

As detailed below, Mr. Hill did not waive the IAD rights which he had previously invoked in writing when, on January 9, 1995, his attorney merely responded "fine" to the court's setting of a May 1, 1995 trial date. Further, none of the limited circumstances in which waiver applies to IAD cases are present in the facts of this case.

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[12] Ford also claimed a violation of his speedy trial rights under the Rules of the Southern District of New York. *Mauro*, 436 U.S. at 347 n.9.

[13] In so doing, a defendant who invokes his Article III rights relinquishes the right to challenge extradition to the receiving state with respect to the charge or proceeding underlying the detainer, and to serve any sentence imposed after completion of the term of imprisonment in the sending state. IAD, Article III(e).

Also, as detailed below, waiver analysis is not appropriate in this case because (1) Congress has clearly indicated its intent to limit the circumstances in which the rights created in the IAD may be lost; and (2) when a statutory right conferred on a party is also granted in the public interest, waiver of the right will not generally be allowed where such would thwart the legislative policy which it was designed to effectuate. Additionally, as set forth below, the holding of the New York Court of Appeals, in this New York prosecution, that Mr. Hill's attorney's mere response of "fine" to the court's setting of a trial date was not a waiver of Mr. Hill's IAD rights, was both a correct determination and one properly within the province of that court.

2. The limited circumstances where waiver analysis is appropriate in IAD cases are not present in this case.

Mr. Hill's attorney's response of "fine" to the trial date selected by the court and agreed to by the prosecution did not waive Mr. Hill's IAD rights. Defense counsel's uncontested[14] responding affirmation establishes that when contacted by the court's secretary in December of 1994 as to his readiness for trial in January or February of 1995, defense counsel responded that any date in those two months would be acceptable (A at 53-54). Had Mr. Hill been brought to trial by January 28, 1995, the statutory requirements would have been satisfied. Moreover,

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[14] Therefore, pursuant to New York State law, these facts are "deemed to be conceded." *People v. Gruden*, 42 N.Y.2d 214, 216-217 (1977).

defense counsel affirmed that he had "never indicated a lack of readiness of any trial date for this Indictment, nor has your affiant or defendant ever requested or suggested a trial date beyond the 180 day limit, or waived the 180 day limit" (A at 53-54).

The Petitioner's characterization of defense counsel's response of "fine" to the court selected trial date as an express waiver of his IAD rights misconstrues the nature of and the requirements for waiver under the IAD.

In an IAD case, waiver can arise only in limited circumstances. Those circumstances appear to be as follows: (1) entry of a guilty plea;[15] or (2) an express request or action by the defense that is contrary to the provisions of the IAD. Additionally, it could be argued that in some circumstances, a defendant waives his IAD rights by failing to raise an IAD claim prior to trial.[16] Mr. Hill did not plead guilty and properly raised his IAD claim in a motion prior to trial. Therefore these bases for waiver will not be discussed in this brief. Further, as detailed below, Mr. Hill did not act, nor did he expressly request

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[15] *See, e.g., Kowalak v. United States*, 645 F.2d 534 (6th Cir. 1981); *but see Mitchell v. United States*, ___ U.S. ___, 119 S.Ct. 1307 (1999) (wherein this Court recently discussed the limits on waiver as a result of guilty pleas).

[16] *United States v. Eaddy*, 595 F.2d 341 (6th Cir. 1978). However, as noted earlier, this Court has specifically refused to find that a defendant waived his rights under the IAD when he failed to object or make a motion to dismiss for failure to comply with the IAD, but rather merely sought dismissal on constitutional speedy trial grounds. *United States v. Mauro*, 436 U.S. 340, 364 (1978), *aff'g United States v. Ford*, 550 F.2d 732 (2nd Cir. 1977).

to be treated, in a manner contrary to the provisions of the IAD.

Numerous circuit courts have held that where a defendant affirmatively requests treatment in a manner contrary to the provisions of the IAD, he may be found to have waived his IAD rights. *See, e.g., Snyder v. Sumner*, 960 F.2d 1448 (9th Cir. 1992) (defense request for a continuance constituted waiver of the time period at issue); *Yellen v. Cooper*, 828 F.2d 1471 (10th Cir. 1987) (defendant's demand for a speedy trial on other charges delaying trial of charges on which detainer was based constituted waiver of IAD pre-transfer rights); *Webb v. Keohane*, 804 F.2d 413 (7th Cir. 1986) (prisoner's request to be transferred to another correctional facility waived his IAD rights); *United States v. Ford*, 550 F.2d 732, 742 (2nd Cir. 1977), *aff'd sub nom., United States v. Mauro*, 436 U.S. 340 (1978) (prisoner's request for transfer waived his Article IV(e) claim regarding the effected time period).

Of note, many courts around the nation have applied waiver analysis where, it is respectfully asserted, "good cause" was the applicable tolling provision. Even where the outcome of these cases was correct in that "good cause" was shown for the continuances in question, use by the courts of waiver analysis in such circumstances was, nonetheless, erroneous. This imprecise substitution of waiver analysis for the statutory standard of "good cause" has resulted in erroneous findings of "waiver." *See, e.g., United States v. Odom*, 674 F.2d 228 (4th Cir. 1982) (waiver found where defense counsel requested a continuance as the psychiatric evaluation of his client was not yet complete and jointly prepared with the Government a formal motion for continuance and exclusion under the

FSTA); *Drescher v. Superior Court*, 267 Cal.Rptr. 661 (Cal. Ct. App. 1990) (despite a finding that the continuances at issue were for "good cause shown," 267 Cal.Rptr. at 666 n.4, the court held waiver to apply as defendant freely acquiesced in the numerous continuances of the preliminary hearing); *People v. Jones*, 495 N.W.2d 159 (Mich. App. 1992) (agreement to a continuance constituted waiver).

Consequently, the impact of these holdings has been an erosion of the strict standards set by Congress for permitting departures from the time requirements imposed by the IAD for the disposition of the charges upon which a detainer was based. The harm flowing from this faulty analysis is especially egregious because it is essential to the maintenance of the separation of powers that judicial waiver analysis be consistent with the congressionally enacted tests. Accordingly, such waiver analysis should never override but, instead, must complement the statutory tests for tolling the IAD's time requirement.[17]

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[17] A laudable recognition of the scope and purpose of the tolling provisions set forth by Congress in the IAD appears in *State v. Dolbeare*, 663 A.2d 85 (N.H. 1995), where the court rejected the claim that defendant's withdrawal of a notice of intent to plead guilty constituted a waiver of his IAD rights. The court wisely observed that, while not present in the facts before it, where a prisoner attempts to manipulate the system, e.g., by filing a notice of intent to enter a plea just before trial and then withdrawing it a few days after the scheduled trial date, the state could request a continuance pursuant to the "good cause" provision. Thus, where other courts might have incorrectly applied waiver analysis to these facts, the *Dolbeare* court's holding illustrates a proper application of the "good cause" tolling provision of the IAD.

Indeed, the case at bar presents just such an instance of where waiver analysis was inappropriately applied. When the Respondent moved to dismiss the indictment based upon the IAD violation, the court, instead of applying the "good cause" test for tolling found in the IAD, inappropriately held that the defendant's concurrence with the court's setting of a trial date was waiver. Where Congress has set forth a test for determining when continuances toll the IAD time requirements, courts should not ignore the statutory test and substitute a judicially created waiver analysis.

3. Application of waiver analysis is not appropriate in the case at bar because (1) Congress affirmatively indicated an intent to limit the circumstances in which the rights created by the IAD may be lost and no such exceptions to the limitations apply in this case; and (2) the defense generally cannot, by itself, waive the time requirements of the IAD, as the IAD was enacted for the benefit of both society and prisoners.

a. The general presumption that statutory rights are waivable does not apply to statutes in which Congress has indicated an intent to limit the circumstances in which rights created thereby may be lost or when the statutory provisions are enacted for both the benefit of society and the individual.

This Court has held that waiver is not appropriate where Congress has affirmatively indicated an intent to limit the circumstances in which the rights created may be lost, *United States v. Mezzanatto*, 513 U.S. 196, 201

(1995), or where the statutory provisions at issue were enacted for the benefit of society as well as the party. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

In *Mezzanatto*, 513 U.S. 196, this Court held that there is a general presumption that statutory rights are waivable. However, this Court also recognized that waiver has a more limited application with respect to those statutes in which Congress has affirmatively indicated an intent to limit the circumstances where the rights created thereby may be lost. *Id.* at 201. "[I]f the generally applicable (and generally sound) judicial policy of respecting waiver of rights and privileges should conflict with a reading of the [statute at issue] as reasonably construed to accord with the intent of Congress, there is no doubt that congressional intent should prevail." *Mezzanatto*, 513 U.S. at 211 (Souter, J., dissenting).

Furthermore, this Court has held that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945). "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Id.* at 704; *accord, Town of Newton v. Rumery*, 480 U.S. 386 (1987); *People v. Superior Court of Los Angeles County*, 37 Cal.Rptr.2d 729 (Cal. Ct. App. 1995).

b. By enacting the IAD with both strict time requirements and specific tolling provisions, Congress evinced its intent to limit the circumstances in which the rights accorded by the IAD could be lost.

Congress has enacted explicit tolling provisions within the IAD, thereby evincing its intent to limit the circumstances in which the rights accorded by the IAD could be lost. Additionally, the decision of Congress not to include in the IAD's tolling provision the "good cause . . . or consent" disjunctive language it placed in numerous other statutory tolling provisions further demonstrates an intent to limit the exceptions to the IAD's time requirements. (For examples of congressional statutes where "good cause . . . or consent" language is used, see Point I(B) at text at n.11.)

A review of the case law regarding waiver pursuant to the FSTA, which contains similar tolling provisions, is instructive because the FSTA and IAD are "related statutes having the same purpose" and "should be construed together." *United States v. Odom*, 674 F.2d 228, 231 (4th Cir. 1982). Citing this similarity in language and purpose to the FSTA in explaining why the IAD and FSTA should be construed together, the court in *Odom* stated:

> The Detainer Act and the Speedy Trial Act deal with the same subject matter. Both were enacted to serve the best interest of the public and the defendant by requiring the prompt disposition of criminal charges. Both provide for detaining a defendant imprisoned in another jurisdiction and require his prompt transfer and trial. Both contain statutory limitations on the time that may elapse before a defendant is brought to

> trial. Both permit extensions of this time. Both impose the sanction of dismissal of the charges when their limitations are transgressed.

Id. at 231. The court also wrote that "[w]henever possible, the interpretation of the Acts should not be discordant." *Id.* at 231.

In enacting the FSTA, Congress provided numerous tests for determining whether time periods should be tolled and also provided the "ends of justice" test for determining whether continuances – even those granted on the consent of the parties – are subject to the statutory time periods. The FSTA exemplifies congressional intent in limiting the circumstances where the rights created thereby can be lost. Therefore, the courts have uniformly applied the FSTA's tolling tests and not waiver analysis in determining whether a continuance should be excluded from the FSTA's time requirements. *See, e.g., United States v. Barnes*, 159 F.3d 4, 12-13 (1st Cir. 1998) (fact that defense has requested or consents to a continuance not sufficient to toll time limits; whether continuance is lawful turns on whether court abused its discretion in granting the adjournment); *United States v. Staton*, 94 F.3d 643 (4th Cir. 1996) (defense motion for continuance only excludable if judge granted continuance based on finding that ends of justice served).

Similarly, the IAD contains three congressionally enacted tolling provisions.[18] By enacting the IAD with

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[18] As set forth in Point I(C), the three tolling provisions are: continuances for "good cause shown" (Article III[a]); inability of the defendant to stand trial (Article VI); and where a prisoner escapes (Article III[f]).

these explicit provisions, Congress specifically determined that matters covered by those provisions must be considered under the statutory test created therein for deciding whether the tolling provisions are applicable. Specifically, Congress decided that only "necessary or reasonable" continuances for "good cause shown" in open court are excludable from the IAD time requirements. Thus, instead of determining whether there was a waiver of Mr. Hill's IAD rights with respect to the continuance granted on January 9, 1995, the court should have determined whether the continuance was granted upon a showing of "good cause."

The trial court failed to undertake this required analysis. In failing to do so, it ignored the clear intent of Congress. It is essential that judicial waiver analysis be conducted in a manner consistent with the congressionally enacted tests since such analysis should never override but, instead, complement those for tolling the statutory time period. Deference to congressional intent requires that any waiver analysis regarding a statute, such as the IAD which contains tolling provisions, be limited. Otherwise, the judicially created waiver doctrine would effectively eliminate the "good cause" tolling provisions of the IAD.

The IAD, like the FSTA, has tolling provisions and does not have an express waiver provision. Nor does the IAD have a provision similar to that present in numerous other federal statutes expressly providing that a party's consent nullifies the statutorily mandated time period. Courts must presume that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)

(citations omitted). Courts are not free to modify or disregard the requirements of an interstate compact, and must grant relief in accordance with its express terms. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). Moreover, a court's task "is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) (citation omitted).

Consequently, and contrary to the position of the Petitioner, just as with the FSTA, a defendant's concurrence to a trial date set by the court in an IAD case should not be considered to be a *per se* waiver of the defendant's rights under the Act. To hold otherwise would undermine the congressionally enacted IAD by allowing waiver analysis to effectively supplant its explicit tolling provisions.

c. The IAD was enacted for the benefit of both society and the detainee and, thus, the detainee's ability to waive the IAD's requirements is limited.

This Court has held that a party cannot, itself, waive its rights where the statute at issue was enacted for the benefit of society as well as the party. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. at 704; *accord, Town of Newton v. Rumery*, 480 U.S. 386 (1987); *People v. Superior Court of Los Angeles County*, 37 Cal.Rptr.2d 729 (Cal. Ct. App. 1995).

The FSTA again provides an excellent analogy. Numerous courts have held that a defendant generally

cannot waive the FSTA's speedy trial provisions.[19] These decisions, premised on recognition that the FSTA serves not only the interest of the defendant, but also that of the public, hold that a defendant generally cannot waive the public's interest in a speedy trial. As the First Circuit has recognized, " ' . . . [f]rom the point of view of the public, a speedy trial is necessary to preserve the means of proving the charge [and] to maximize the deterrent effect of prosecution and conviction. . . . ' Standards Relating to Speedy Trial § 1.1 commentary (1968)." *United States v. Pringle*, 751 F.2d 419, 429 (1st Cir. 1984) (holding that delay in an FSTA case may be held to be excludable where the defendant caused the delay).

As acknowledged in the Amicus Brief of the Solicitor General, in quoting Congress, there is a societal interest served by the IAD, which "enable[s] the prison authorities to plan more effectively for [the detainee's] rehabilitation and his return to society" (Brief for United States as Amicus Curiae at 12 n.6). One court has explained that the FSTA and IAD were both "enacted to serve the best interest of the public and the defendant by requiring the prompt disposition of criminal charges." *United States v. Odom*, 674 F.2d at 231. Other important societal interests are also served by the IAD, especially when, as in this case, it is invoked by the prisoner. The IAD requires that a prisoner who demands to be tried on the charge upon which the detainer is based waive extradition back to the sending state, thereby enabling a

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[19] *See, e.g., United States v. Barnes*, 159 F.3d 4, 12-13 (1st Cir. 1998); *United States. v. Staton*, 94 F.3d 643 (4th Cir. 1996).

speedy resolution of the matter. IAD, Article III(e); *Pitsonbarger v. Gramley*, 103 F.3d 1293 (7th Cir. 1996). Thus, as the court in *Pitsonbarger* wrote:

> Article I of the IAD makes it clear that, insofar as individual interests may be created at all under the statute, they relate to the interest in the "expeditious and orderly disposition of [outstanding charges and untried indictments]" – in other words, the right to a speedy trial.

Id. at 1301-1302.

The Solicitor General, noting that the IAD authorizes the prisoner, but not the prison authorities, to request the disposition of the pending charges underlying a detainer, argues that the public's interests in the IAD is secondary to the interests of the prisoner (Brief for United States as Amicus Curiae at 12 n.6). First, this argument ignores the important societal benefits of the IAD which create a readily available procedure for states to obtain prisoners from other states so they can be expeditiously tried in the receiving state. *See, e.g, People v. Newton*, 764 P.2d 1182 (Colo. 1988) (one of the purposes of the IAD is to benefit states agreeing to accept its provisions by expediting the difficult process of disposing of criminal charges pending against persons who are no longer in the jurisdiction of the forum). The Solicitor General's argument in this regard also fails to recognize the substantial body of law regarding the societal benefits of speedy trial statutes. Next, the argument that the IAD procedures can only be invoked by the receiving state and by the prisoner but not by the sending state, and therefore there is only a secondary public benefit, fails to appreciate that the benefits to the prisoner also only attach when the IAD is

invoked. Additionally, this notion, that if the societal interests are somehow secondary the statutory requirements may be readily waived by an individual, is unsupported by this Court's holdings. *See, e.g., Brooklyn Savings Bank v O'Neil*, 324 U.S. 697 (1945); *accord, Town of Newton v. Rumery*, 480 U.S. 386 (1987). As the provisions of the IAD clearly benefit society, it follows that a defendant should not easily be allowed to waive the time requirements of the IAD.

4. The holding of the New York Court of Appeals in dismissing Mr. Hill's New York indictment was correct and was within the province of that court.

The IAD requires uniform interpretation as to the circumstances which are insufficient to permit either tolling or waiver of the IAD time requirements. Federal law establishes what conduct does not meet the requirements of the IAD tolling provisions and the application of waiver to the IAD. The establishment of a uniform federal standard as to what circumstances cannot excuse the failure to comply with the IAD time requirements is important. The congressional intent in enacting the IAD is undermined if receiving states that have obtained custody of other states' prisoners for the purposes of speedy prosecution can render decisions that readily delay such prosecution. Thus, without consistent holdings as to what circumstances neither toll nor waive the IAD's requirements, some sending states will be reluctant to send inmates to receiving states that are too eager to find "good cause" or waiver, thereby frustrating the societal

and individual interests advanced by compliance with the IAD.

By contrast, imposing a high standard for finding either "good cause" or waiver furthers the IAD's purpose of insuring that the receiving jurisdictions comply with the IAD time requirements and speedily dispose of the charges on which the detainer is based. This is the standard which Congress indicated should be applied when it wrote that the IAD is to be " . . . liberally construed in order to effectuate its purposes." IAD, Article IX. The refusal of the New York Court of Appeals to apply waiver in the case at bar furthered the congressional intent and purpose in enacting the IAD.

Nothing in the nature or purpose of the Act or the concepts of federalism[20] are interfered with – indeed each is furthered – when states, such as New York in this case, decide to interpret the provisions of the IAD in a manner which does not negatively impact any other state and which furthers the purposes of the IAD. In this state prosecution, the holding of the New York Court of Appeals did not reduce the obligation of New York to comply with the IAD. Rather, the holding furthered the purposes of the IAD of insuring that receiving states timely try prisoners transferred pursuant to the IAD, and did so without violating either Mr. Hill's rights or those of Ohio, the sending state.[21] The dismissal of the New

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[20] The IAD is a federal and state law. *Carchman v. Nash*, 473 U.S. 716 (1985).

[21] New York courts could have dismissed Mr. Hill's charges for a variety of unrelated reasons (e.g., a defective grand jury proceeding; illegally obtained evidence; state speedy trial

York prosecution by the New York Court of Appeals for failure to comply with the IAD furthers the IAD's goals of assuring both New York detainees imprisoned in other states and the sending states that if the IAD is invoked, such detainees will have their cases speedily handled in New York.

Accordingly, even if a court in another state might be inclined to find that defense counsel's concurrence with the proposed trial date supports a finding of good cause or waiver, New York courts should still have the authority to rule that New York will not excuse New York's failure to comply with the IAD under these circumstances. After all, the IAD is, indeed, a law of New York State.[22] Moreover, allowing states to, arguably, require more of themselves in terms of the IAD than the federal baseline furthers the interests of society, the detainee, and the sending states. States such as New York, which in the context of their state speedy trial statutes, have held that if a purported waiver or tolling of speedy trial rights is ambiguous, such ambiguity will be resolved against the prosecutor and waiver or tolling will not be found, *People v. Cortes*, 604 N.E.2d 71 (N.Y. 1992), should be able to apply a consistent standard regarding an ambiguous purported waiver in IAD cases.

In *People v. Allen*, 744 P.2d 73 (Colo. 1987), the Colorado Supreme Court held that defense counsel's response of "fine" to a court proposed trial date was not a wavier

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violation) without implicating the interests of Ohio, as Ohio would still have had Mr. Hill returned to it.

[22] N.Y. Crim. Proc. Law § 580.20; *Reed v. Farley*, 512 U.S. 339, 347 (1994); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

of his client's IAD rights. Petitioner argues that *People v. Newton*, 764 P.2d 1182 (Colo. 1988), impliedly overruled *Allen*, 744 P.2d 73 (Brief for Petitioner at 17). However, in *Newton*, 764 P.2d 1182, 1188, the court read into the IAD a recently amended provision of a Colorado speedy trial statute which expressly requires an objection to an extension of the speedy trial period.[23] No such provision existed in Colorado at the time of the *Allen* decision. *People v. Allen*, 744 P.2d 73. New York does not have such an objection requirement within its state speedy trial statute.

The Supreme Court of Kentucky, in considering facts nearly identical to those in the case at bar, also refused to find that,

> the defendant's acquiescence in the . . . trial dates . . . directly contributed to the speedy trial violation. Instead, . . . the trial was set beyond the time allowed by statute because the prosecution was unaware of the precise character of the defendant's speedy trial rights and failed to comply with its obligations under the Interstate Agreement.

Roberson v. Kentucky, 913 S.W.2d 310, 314 (Ky. 1994) (quoting *Allen*, 744 P.2d at 76) (citations omitted).

Thus, Colorado and Kentucky, considering facts indistinguishable from those in the case at bar, both determined in the context of their state practices and laws that there was no waiver of IAD rights. The New York Court of Appeals' holding in Mr. Hill's case is in full accord with the holdings of these courts.

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[23] The propriety of the Colorado court's holding, which effectively amended the IAD, is not at issue here.

The record in the case at bar depicts exactly that which the New York Court of Appeals found, i.e., "the defendant simply concurred in a trial date proposed by the court and accepted by the prosecution and that date fell outside the 180-day period." *People v. Hill*, 704 N.E.2d 542, 545 (N.Y. 1998). The Court of Appeals holding that "no waiver of his speedy trial rights was effected" is supported by, and is consistent with, the law in other states. States need enough flexibility to adequately determine cases where factual ambiguities of the type seen in the case at bar arise. A reversal of the holding of the New York Court of Appeals in Mr. Hill's case would undermine Congress' purpose and intent in enacting the IAD.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

EDWARD JOHN NOWAK
Monroe County Public Defender

BRIAN SHIFFRIN
First Assistant Public Defender

STEPHEN J. BIRD
Assistant Public Defender

August, 1999

(8)

No. 98-1299

In The

Supreme Court of the United States

THE STATE OF NEW YORK,

Petitioner,

vs.

MICHAEL HILL,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

HOWARD R. RELIN
District Attorney of Monroe County
Counsel for Petitioner
Suite 382, Ebenezer Watts Building
47 South Fitzhugh Street
Rochester, New York 14614
(716) 428-5680

Of Counsel:
Robert Mastrocola,
Assistant District Attorney

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(3249)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

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ARGUMENT

The issue presented by this case is whether a defendant can expressly agree to conduct his trial beyond the Interstate Agreement on Detainers' (IAD) statutory period and then turn around and disclaim his prior agreement and obtain dismissal of the case because the trial was untimely, thus "sandbagging" the court and prosecution. Regardless of respondent's actual intent here the effect of his express agreement to the trial date was the same as if he had consciously sought to trap or sandbag the prosecution and the court in that it led them to believe that all was well and thus lulled them into a posture of inaction, only to have respondent then turn around and seek dismissal by disavowing his earlier agreement at a time when the problem could no longer be corrected. The holding of the New York Court of Appeals now allows for this, but a defendant's attempt to use the IAD as both a sword and a shield in this manner should not be countenanced.

A. Respondent's discussions of the tolling provisions of the Interstate Agreement on Detainers and the duty of compliance thereunder are irrelevant.

Much of respondent's opposing brief is addressed to the IAD's tolling provisions allowing for "necessary and reasonable continuances" upon a showing of good cause in open court (Arts. III[a], IV[c]) and for exclusion of time "whenever a defendant is unable to stand trial" (Art. VI[a]). Respondent contends that his agreement to an untimely trial date did not fit within these tolling provisions; however, at least from the outset of appellate proceedings in this matter petitioner has never contended otherwise. Rather, we have simply urged that, as the trial court

found in denying respondent's dismissal motion, respondent's express agreement waived his IAD rights. Similarly, while respondent claims that courts and prosecutors have the responsibility to ensure that the IAD's provisions are complied with we take no issue with such duty of compliance, but such also has no bearing on the waiver issue.[1] In the same vein, respondent's discussion of the doctrines of "preservation" and "contemporaneous objection" are likewise irrelevant since we have never contended that respondent failed to preserve his IAD claim for appellate review and as we have repeatedly emphasized this case does not involve waiver by silence or failure to object but instead waiver by express, affirmative conduct. Respondent thus goes to great lengths to establish propositions that are not at issue in this case, and while the statute in question may indeed impose certain duties on the court and the prosecution and contain provisions for tolling the period within which a defendant has a right to be tried "such conclusion[s] [say] nothing about whether a defendant may relinquish that right by voluntary agreement" (*Mezzanatto*, 513 U.S. at 200, n.2). Thus, whether under the IAD the defendant's consent to a particular procedure allows for exclusion of a certain time period for purposes of calculating when

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1 Indeed, as would be expected by the very nature of our system of criminal jurisprudence few criminal statutory procedures place the "burden", if any, on the defendant, yet this hardly means that the defendant cannot waive such procedural protections; as this Court has made plain, there is a general presumption that rights are waivable (*e.g., United States v Mezzanatto*, 513 U.S. 196, 200-201 [1995]; *see also, Peretz v United States*, 501 US 923, 936-937 [1991]).

the defendant's trial is to be held has no bearing on the issue presented here of whether the defendant can then simply (and directly) relinquish that right to trial within the established period.

B. Respondent, despite also arguing to the contrary, concedes that IAD rights may be waived.

Respondent's brief in opposition is actually an extended exercise in self-contradiction, as at various times he concedes that IAD rights may be waived - while further claiming that the circumstances here do not constitute waiver - yet at other times he contends that IAD rights cannot be waived. Respondent of course cannot have it both ways, and he indeed has it right when he asserts that "action by the defense that is contrary to the provisions of the IAD" constitutes waiver (Br. For Resp. 28; *see also, id.* at 9 ["waiver should only be found where the actions of the defendant clearly require a finding that the defendant relinquished his right to assert violations of the IAD"]). While respondent also urges that he "did not act . . . in a manner contrary to the provisions of the IAD" (*id.*, at 28-29), with all due respect, if expressly agreeing to trial beyond the statutory period is not acting contrary to the IAD then nothing is.

Respondent's claim that "many courts" have imprecisely substituted waiver analysis for the statutory good cause tolling standard (*id.*, at 29-30) is incorrect. He cites only three cases in this regard, none of which support his argument. Indeed, in *United States v Odom* (674 F.2d 228 [4th Cir 1982], *cert. denied* 457 U.S. 1125 [1982]) the court, in addition to discussing waiver, expressly addressed the good cause tolling provision and made clear that its waiver analysis was separate and distinct therefrom, while in *Drescher v. Superior Court* (218 Cal. App.3d 1140, 267

Cal. Rptr. 661 [Cal. Ct. App. 1990]) the court also clearly distinguished between continuances prior and up to the court proceeding at which the trial date was set and the trial setting proceeding itself (*id.*, at 1148, 267 Cal. Rptr. at 666). The authority previously cited by petitioner in our main brief dispels any notion that the courts therein were mistakenly commingling the discrete concepts of good cause continuances and waiver – waiver was instead recognized as a very distinct concept in those decisions.

Respondent further asserts that waiver analysis "should never override but, instead, must complement the IAD's time requirement" (Br. for Resp. 30); however, waiver by its very nature constitutes an "overriding" of statutory provisions since it represents the surrender of one's right to rely thereon. It is difficult to understand how waiver could "complement" statutory tolling provisions and still be considered "waiver" as that concept is generally understood, especially since respondent concedes that waiver arises by a defendant's action that is contrary to the provisions of the IAD. What respondent is really suggesting in this regard is that waiver must essentially meet the statutory test for tolling, which of course would make the idea of waiver redundant and in effect a nullity. This in turn is really no different than saying that waiver is subsumed within the tolling provisions and is not otherwise independently applicable or available, a claim which, despite his concessions to the contrary, defendant also makes more directly but which is groundless.

C. IAD rights are waivable.

Despite his express acknowledgment throughout these proceedings, including in his brief to this Court, that IAD rights are waivable in general and can be waived specifically by action

of the defense contrary to the IAD, respondent now for the first time also claims that IAD rights are not waivable (*e.g.*, Br. for Resp. 31-39). However, we submit that respondent has in fact waived his nonwaivability argument by failing to raise it in his brief in opposition to the petition for certiorari (*e.g.*, *Knowles v. Iowa*, 525 U.S. 113, __, n.2 [1998]; *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 [1985]; Court Rule 15.2).

In any event, respondent's claim is erroneous as he wholly fails to overcome the presumption of waivability (*e.g.*, *Mezzanatto*, 513 U.S. at 200-201). Initially, his apparent reliance on *United States v. Mauro* (436 U.S. 340 [1978], *affg. United States v. Ford*, 550 F.2d 732 [2nd Cir. 1977]) is misplaced. Clearly *Mauro* does not suggest that IAD rights are not waivable; to the contrary, there this Court undertook an analysis of whether the defendant had waived the IAD and concluded that he had not since from the time he was arrested he persistently requested that he be given a speedy trial (at one point specifically mentioning that the detainer was causing him denial of certain privileges in prison) and thus his actions were sufficient to put the government and the trial court on notice of the substance of his claim (*Mauro*, 436 U.S. at 364). "This factual analysis would have been pointless if the Court were of the opinion that IAD rights could not be waived" (*Kowalak v. United States*, 645 F.2d 534, 537, n. 1 [6th Cir. 1981]). Here, as we have previously noted (Br. for Pet. 21), respondent never made any mention of even general speedy trial concerns, let alone IAD concerns, until he brought his motion for dismissal under the IAD after the statutory period had expired. Furthermore, since constitutional speedy trial rights are waivable (*see*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 [1973]; *Barker v. Wingo*, 407 U.S. 514 [1972]) certainly statutory speedy trial rights are presumably waivable as well (*see generally*, *Annotation*, *Waiver or Loss of Accused's Right to Speedy Trial*, 57 A.L.R.2d

302, §§3, 9 [1958] [indicating that speedy trial waiver is available in vast majority of jurisdictions]).

The IAD of course does not by its own terms preclude waiver (*see*, *Mezzanatto*, 513 U.S. at 201-202 [express waiver clause may preclude waiver under any other circumstances]), and respondent's discussion of "Congressional intent" regarding the IAD to support his view of nonwaivability is inaccurate and unpersuasive. In the first place, while respondent repeatedly refers to Congress's "drafting" of the IAD, Congress did not draft such. The IAD was drafted primarily by various state and local representatives and agencies more than a decade before Congress "signed on" and joined the United States and the District of Columbia as parties to the Agreement in 1970 (*e.g.*, *Mauro*, 436 U.S. at 343, 349-351). (By that time more than half of the States now party to the agreement had already joined [S. Rep. No. 91-1356 (1970) *reprinted in* 1970 U.S.C.C.A.N. 4864, 4866].) Thus, as for any intent of Congress there was relatively little, if any, at least in the sense of "independent" intent; "Congress enacted the Agreement into law . . . with relatively little discussion and no apparent opposition" (*Mauro*, 436 U.S. at 353 [emphasis added]).[2] Moreover, there is no discussion whatsoever in either the federal or the state/local legislative history regarding the general waivability of the provisions, let alone an affirmative indication that waiver (either of the overall provisions in general or the

2 Thus respondent's claim that Congress made a conscious "decision" to not include a reference to "consent" in the good cause tolling provision of the IAD as it did in drafting other legislation is spurious - Congress did not create the IAD but merely joined in a statute already created; there was no reason for Congress to alter the IAD even if it could, as the whole idea behind uniform legislation is uniformity.

speedy trial provisions in particular) was deemed undesirable and unavailable.

While respondent urges a comparison between the Federal Speedy Trial Act (FSTA as designated by respondent) and the IAD to support his claim of nonwaivability, such comparison actually defeats his position. Thus, while respondent refers to the fact that the IAD and the FSTA both contain specific tolling provisions that alone does not preclude waiver.[3] Both the statutory text and the legislative history of the FSTA, which was crafted by Congress some years after Congress "joined" the IAD, clearly reflect a desire to strictly limit the availability of waiver, in stark contrast to the IAD. Thus, the FSTA, unlike the IAD (and contrary to respondent's assertion [Br. for Resp. 35]), expressly provides that "[f]ailure of a defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal [of the case]" (18 U.S.C. §3162[a][2] [emphasis added]), and as noted an express waiver clause may suggest that Congress intended to preclude waiver

3 Respondent also refers to the IAD's "strict time requirements", but such is a necessary component of any statutory speedy trial provision lest such provision be superfluous.

under other unstated circumstances (*Mezzanatto*, 513 U.S. at 201).[4] Furthermore, while a significant "public (societal) interest" in statutory provisions may preclude waiver by a private party, once again the FSTA, unlike the IAD, expressly establishes such interest. Thus, section 3161(h)(8)(A) – the provision most analogous to the good cause tolling provision of the IAD – provides that delay caused by a continuance will be excluded from the speedy trial period only if

> the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or

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4 Dismissal of the case is the only sanction or remedy available under the IAD and the primary sanction/remedy under the FSTA; as this Court stated in *Barker v. Wingo* (407 U.S., *supra*):

> The amorphous quality of the [speedy trial] right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exlusionary rule or a reversal for a new trial, but it is the only possible remedy (*id.*, at 522 [footnote omitted]).

> in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial (emphasis added).

Thus Congress expressly recognized and emphasized the public's interest in a speedy trial under the FSTA, and this statutorily affirmed interest is further buttressed by express legislative history which makes disapproval of waiver unmistakably clear:

> The [Senate] Committee wishes to state, in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal . . . is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.
>
> (S. Rep. No. 212, 96th Cong., 1st Sess. 28-29 [1979]).

The total lack of any similar language in the IAD or any similar expression of intent in the legislative history thereof is striking, and respondent's attempt to transplant the text and legislative history from the FSTA to the IAD is inappropriate, especially in

light of the principle that statutory rights are presumptively waivable .[5] Thus, waiver, while not generally available under the FSTA, is available under the IAD and many of the very same courts recognize this distinction – certainly no Federal Courts of Appeals have found the IAD unwaivable (*see*, Br. for Pet. 6-7; Br. for Amicus 8-9, n.5, 12-13, n.7).

While there may be a societal interest in the IAD, as previously explained by petitioner (Br. for Pet. 7) and the United States (U.S. Amicus Br. 10-12) such is subsidiary to that of the prisoner, who is the primary beneficiary of the IAD. As respondent expressly conceded below, "[t]he rights created by the IAD are for the benefit of the prisoner, exist for his protection and are personal to him."(Br. for App. [N.Y.Ct. Apls.] 11). "The legislative history of the Agreement . . . emphasizes that a primary purpose of [it] is to protect prisoners against whom detainers are outstanding" (*Cuyler v. Adams*, 449 U.S. 433, 449 [1981] [emphasis added]). Furthermore, while the IAD "enable[s] the prison authorities to plan more effectively for [the prisoner's] rehabilitation and return to society" (S. Rep. No. 91-1356 (1970) *reprinted in* 1970 U.S.C.C.A.N. 4865) it reserves to the prisoner and the state lodging the detainer – which is not likely concerned with possibly disrupting the prisoner's rehabilitation – the decision to pursue disposition of the detainer charges; the prison authorities may not compel disposition by instigating the prisoner's transfer. In fact, the state lodging the detainer is not compelled under the IAD to even pursue a transfer and even when it does the sending

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5 Indeed, one can reasonably contend that Congress itself recognized the waivability of the IAD in light of the intent it expressed and the precise statutory language it utilized in drafting the FSTA in light of the IAD, which was already "on the books" without any similar intent or language.

state ("the governor") can disapprove such (Art. IV[a]); thus it is only the prisoner who has absolute control over the transfer.

Indeed, many of the public concerns addressed by a general speedy trial requirement are implicated to a much lesser degree or altogether extinguished in an IAD case in comparison to a "normal" (i.e., non-IAD) case. This Court identified certain societal speedy trial interests in *Barker v. Wingo* (*supra*), explaining that the inability of courts to provide a prompt trial contributes to a backlog of cases which, e.g., enables defendants to negotiate more effectively for pleas to lesser offenses and otherwise manipulate the system; that defendants released on bail for lengthy periods awaiting trial have an opportunity to commit other crimes and may be tempted to jump bail and escape; that if defendants cannot make bail they are generally held in local jails with overcrowding and deplorable conditions which have a detrimental effect on rehabilitation; and that lengthy pretrial incarceration is costly in terms of actual detention as well as lost wages which defendants might have earned and support to families of incarcerated defendants (*id.*, at 520-521). However, in the case of an inmate transferred from one facility to another under the IAD most of these concerns are either minimal or altogether nonexistent. Thus, the IAD defendant, unlike the "typical" defendant, is already in custody and must remain in custody throughout the proceedings; bail is not available and the defendant does not have the opportunity to jump bail and/or commit other crimes, nor is the "cost" of detention a consideration (other than which jurisdiction bears such) since such is mandatory and unavoidable. In addition, the number of IAD defendants in the typical local (i.e., receiving state) facility at any given time is minuscule compared to the regular inmate population, and the very nature of the IAD process - with its additional procedures and corresponding paperwork, etc. - tends to ensure that as a practical

matter only more serious or significant cases which will garner a measure of extra attention are involved, meaning that such cases are less likely than "regular" cases to fall through the cracks and/or allow for manipulation of the system by defendants and undesirably lenient plea bargains. The primary purpose of the IAD is to benefit the prisoner, who thus should be free to waive his IAD protections if he determines that such would best accommodate his interests - this Court should "hesitate to elevate more diffused public interests above [respondent's] considered decision that he would benefit personally from [waiver]" (*Town of Newton v. Rumery*, 480 U.S. 386, 395 [1987]).[6]

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6 It must also be noted that even under the generally nonwaivable FSTA a number of courts have recognized a common-sense exception for delays caused or furthered by a defendant's conduct (*e.g., United States v. Gambino*, 59 F.3d 353, 360-361 [2nd Cir. 1995], *cert. denied* 517 U.S. 1187 [1996]; *United States v. Kucik*, 909 F.2d 206, 210-211 [7th Cir. 1990], *cert. denied* 498 U.S. 1070 [1991]; *United States v. Pringle*, 751 F.2d 419, 434 [1st Cir. 1984]). The *Pringle* court explained that a defendant should not be allowed to "[work] both sides of the street" and be rewarded with an enhanced chance for dismissal by "lulling the court and prosecution into a false sense of security"; to the extent the Act protects the public's interests in a speedy trial it places limits on the actions of the defense, and where it is the conduct of the defense which creates the delay it is only the public's interest which is violated, thus dismissal as a sanction is inappropriate since it would serve as a powerful incentive for defendants to create delay (751 F.2d at 434; *see also, Kucik*, 909 F.2d at 211 [regardless of whether defendant intentionally set trap for government and court, where he actively participated in continuance he could not then "sandbag" government and court by counting that time in speedy trial motion]).

D. While the holding of the New York Court of Appeals was certainly "within its province" it was also wrong and if allowed to stand will not only permit sandbagging but will also promote diversity and inconsistency in IAD practice instead of the necessary uniformity.

Respondent lastly appears to contend that the holding of the New York Court of Appeals should be allowed to stand because each party to the IAD should be free to employ its own waiver analysis even though such may result in irreconcilably conflicting determinations under identical factual scenarios. Yet in practically the same breath respondent recognizes and indeed emphasizes the need for "uniform interpretation" of the IAD and a "uniform federal standard" regarding waiver (Br. for Resp. 39).[7] The whole reason this case is before the Court is to decide how a defendant's express agreement to an untimely trial date impacts the IAD since heretofore the IAD parties have not resolved this issue consistently. It hardly promotes the uniformity of a supposedly uniform law – the very existence of which is based on mutual agreement – or fosters respect for our system of justice to tolerate a situation where, e.g., defendants identically situated might be convicted of murder and sentenced to death or instead have their murder cases forever dismissed simply because the respective jurisdictions applied the very same law differently.

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7 Consideration of what circumstances do not give rise to waiver (*see*, Br. for Resp. 39-40) necessarily entails consideration of circumstances that do.

It must be remembered that the IAD does not disappear from the case once the prisoner is transferred to the receiving state but instead continues to apply until the prisoner is returned - the transfer is only temporary and the prisoner is deemed to remain in the custody of and subject to the jurisdiction of the sending state (*e.g.*, Arts. III[e], IV[a], V[a], [e], [f], [g]). Thus while a prisoner is, e.g., standing trial in the receiving state at which the state rules and procedures attendant a "regular" state prosecution apply, the IAD also continues to operate. If each IAD party were free to apply its own rules to the IAD the whole objective of consistency and certainty would be defeated. Indeed, this Court would have had no occasion to consider, e.g., at what point the Article III 180-day period "commences" (*Fex v. Michigan*, 507 U.S. 43 [1992]) or whether the IAD applies to probation violation charges (*Carchman v. Nash*, 473 U.S. 716 [1985]) if it were deemed preferable to leave such to the individual parties even though the result was irreconcilable conflict. Moreover, it makes no sense to say that interpretation/application of the IAD's actual statutory provisions should be subject to a national, uniform standard yet whether those provisions can be/are waived or do not apply should not be subject to such a standard and should instead be left to some fifty different evaluations. These notions are merely two sides of the same coin and thus should be treated in the same manner (*see*, *Cuyler*, 449 U.S. at 438 ["construction" of IAD presents federal question], 442 ["interpretation" of IAD presents federal question]).

Furthermore, respondent's suggestion that the New York Court of Appeals was merely applying a "state" waiver analysis to the issue here is wrong; it is clear from that court's decision that it was instead relying on "national", including federal, authority addressing the IAD (Pet. for Cert. A-6-A-8). There was no violation of the state speedy trial statute here (a "ready trial" rule)

(N.Y. Crim. Proc. Law §30.30 [McKinney 1992]) as the People announced readiness for trial repeatedly from the time of respondent's initial court appearance in New York following his transfer (App. 50, 51, 36), which was all that was required. Respondent never claimed any state speedy trial violation and the New York Court of Appeals made no reference whatsoever to this state statute in addressing the IAD issue. In any event, contrary to respondent's contention, under the state statute a defendant's express agreement to a continuance is normally deemed a waiver sufficient to relieve the People of responsibility for the delay (*see*, *e.g.*, *People v Smith*, 82 N.Y.2d 676, 601 N.Y.S.2d 466, 619 N.E.2d 403 [N.Y. 1993]; *People v Liotta*, 79 N.Y.2d 841, 580 N.Y.S.2d 184, 588 N.E.2d 82 [N.Y. 1992]; *People v Meierdiercks*, 68 N.Y.2d 613, 505 N.Y.S.2d 51, 496 N.E.2d 210 [N.Y. 1986]).

Finally, while IAD parties may "need enough flexibility to adequately determine cases where factual ambiguities ...arise" (Br. for Resp. 43) a holding for petitioner here would not undermine such concern.[8] There is no dispute whatsoever here as to precisely what occurred and the only issue is the legal effect that attaches to the conceded circumstances. A ruling that a defendant's express agreement to an untimely trial under the IAD precludes him from thereafter obtaining dismissal of the case would provide very clear guidance to the IAD parties as well as to the actual "players" in the underlying proceedings.

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8 Respondent stubbornly continues to suggest that there was "ambiguity" in his purported waiver (Br. for Resp. 41, 43), but there is simply no uncertainty about a defendant's actions or intentions when he tells a court that a proposed trial date "will be fine."

We thus continue to urge that the order/judgment of the New York Court of Appeals be reversed and respondent's murder and robbery convictions reinstated.

Respectfully submitted,

HOWARD R. RELIN
District Attorney of Monroe County
Counsel for Petitioner
Ebenezer Watts Building
Suite 832, Ebenezer Watts Building
47 S. Fitzhugh Street
Rochester, New York 14614
(716) 428-5680

Of Counsel:

Robert Mastrocola

Robert Mastrocola,
Assistant District Attorney

No. 98-1299

In the Supreme Court of the United States

THE STATE OF NEW YORK, PETITIONER

v.

MICHAEL HILL

ON WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

LISA SCHIAVO BLATT
Assistant to the Solicitor General

ELIZABETH D. COLLERY
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Article III(a) of the Interstate Agreement on Detainers requires that a prisoner against whom a detainer has been lodged be brought to trial within 180 days after officials in the charging State have received the prisoner's request for disposition of the outstanding charges. The question presented is whether the defendant waives that time limit by expressly agreeing to a trial date beyond the expiration of the 180-day period.

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ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The Interstate Agreement on Detainers (IAD) provides a means by which a prisoner being held in one jurisdiction (the sending State) may obtain a speedy resolution of charges pending against him in another jurisdiction (the receiving State). Article III(a) of the IAD provides that a prisoner against whom a detainer has been lodged "shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court * * * written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint." The question in this case is whether the

defendant's express agreement, through counsel, to begin his trial on a date that comes after the expiration of the 180-day period constitutes a waiver of his speedy trial rights under Article III(a). The United States is a party to the IAD, see 18 U.S.C. App. § 2, at 692, and is subject to the 180-day provision in Article III(a). See *United States* v. *Mauro*, 436 U.S. 340, 354 (1978). The Court's decision will therefore determine the waiver rules applicable to federal defendants who are brought to trial from state prisons pursuant to IAD Article III(a).[1]

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, at 692-695, are set forth in an Appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. The Interstate Agreement on Detainers (IAD) is a compact entered into by 48 States, the United States, and the District of Columbia to achieve the efficient disposition of outstanding criminal charges brought against prisoners incarcerated in other jurisdictions. As "a congressionally sanctioned interstate compact," the IAD is a federal law subject to federal construction. *Carchman* v. *Nash*, 473 U.S. 716, 719 (1985).

A detainer is "a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking that the prisoner be held for the agency, or that the agency be advised when the prisoner's release is imminent." *Fex* v. *Michigan*, 507 U.S. 43, 44 (1993). Article III(a) of the IAD provides that a prisoner against whom a detainer is lodged may demand that he "shall be brought to trial within one hundred and eighty days" after he delivers his written demand to the prosecutor and court in the receiving State, unless that court grants a continuance "for good cause shown." 18 U.S.C. App. § 2, at 692. Article V(c) of the IAD provides that if the prisoner "is not brought to trial within the period provided in article III," the court in which the indictment is pending "shall enter an order dismissing the [indictment] with prejudice, and any detainer based thereon shall cease to be of any force or effect." 18 U.S.C. App. § 2, at 694.[2]

2. On New Year's Eve, 1992, respondent and three companions robbed and murdered Michael Weeks in a suburb of Rochester, New York. C.A. Rec. on Appeal 3, 4-5. Respondent was subsequently incarcerated for a different crime in Grafton, Ohio. Pet. App. A12. He was serving that sentence on December 30, 1993, when Monroe County, New York, prosecutors filed a detainer against him based on the robbery and murder of Weeks. J.A. 3-6. On January 4, 1994, respondent signed a request pursuant to Article III(a) of the IAD for final disposition of the Monroe County charges. The request form advised respondent that, upon delivery of his

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[1] State courts are governed by Article V(c) of the IAD, which requires dismissal with prejudice when the time limits of Article III(a) are not met, see 18 U.S.C. App. § 2, at 693-694. Congress has adopted a separate provision permitting dismissal without prejudice when the United States is the receiving jurisdiction. See 18 U.S.C. App. § 9, at 695.

[2] The IAD similarly requires dismissal of an indictment with prejudice when a prisoner is transferred to the receiving State upon the prosecution's initiative and the prisoner is not brought to trial within 120 days of the prisoner's arrival in the receiving State. IAD Arts. IV(c) and V(c), 18 U.S.C. App. § 2, at 693-694. See *Cuyler* v. *Adams*, 449 U.S. 433, 444 (1981); *United States* v. *Mauro*, 436 U.S. 340, 364-365 (1978).

request to the prosecuting officer and court, "[y]ou shall then be brought to trial within 180 days, unless extended pursuant to provisions of the Agreement [on Detainers]." J.A. 4, 6. Respondent's request was delivered to the Monroe County court and prosecutor on January 10, 1994, thus starting the IAD's 180-day speedy trial clock. Pet. App. A2.

Respondent was formally indicted on March 11, 1994, and returned to New York on May 13, 1994. Pet. 1; Pet. App. A2, A13. On May 18, 1994, the case was adjourned for the filing of defense motions. Pet. App. A6, A13. After pretrial hearings, the court resolved respondent's motions on December 5, 1994. *Id.* at A2, A6, A13. Respondent does not dispute that the filing of those motions tolled Article III's speedy trial provisions between May 18, 1994 and December 5, 1994. *Id.* at A5-A6, A13.[3]

On January 9, 1995, respondent, his counsel, and the prosecutor appeared before the court to set a trial date. J.A. 33-35; Pet. App. A2, A13. As of this date, 161 "countable" days had expired under the IAD. *Id.* at A13-A14.[4] At that hearing, the following colloquy took place:

[3] See IAD, Article III(a), 18 U.S.C. App. § 2, at 692 (permitting reasonable and necessary continuances for "good cause shown in open court"); IAD Article VI(a), 18 U.S.C. App. § 2, at 694 (IAD speedy trial period tolled when prisoner "is unable to stand trial"); see also *United States* v. *Cephas*, 937 F.2d 816, 819 (2d Cir. 1991), cert. denied, 502 U.S. 1037 (1992).

[4] The trial court incorrectly calculated this period to be 167 days because it began counting on January 4, 1994, the day respondent requested his return to New York, rather than on January 10, 1994, the day that his request was received by the Monroe County judicial and prosecuting officials. Pet. App. A14; see *Fex* v. *Michigan*, 507 U.S. at 51-52 (Article III clock starts when officials in receiving State receive the prisoner's request).

> [PROSECUTOR]: Your Honor, Mr. Huether from our office is engaged in a trial today. He told me that the Court was to set a trial date today. I believe the Court may have preliminarily discussed a May 1st date, and Mr. Huether says that would fit in his calendar.
>
> THE COURT: How is that with the defense counsel?
>
> [DEFENSE COUNSEL]: That will be fine, Your Honor.

Id. at A14. The court then scheduled trial to begin May 1, 1995. *Id.* at A13.

On April 17, 1995, the respondent moved to dismiss the indictment based on Article III(a)'s speedy trial provision. Pet. App. A6, A13. The trial court denied the motion, holding that the respondent "waived his right to a trial within the 180-day period by concurring in the decision to set a trial date beyond the statutory period." *Id.* at A14. The court explained that counsel for respondent and the prosecutor "were present at the time the trial date was set"; "[t]he court sought input from both attorneys with respect to the proposed trial date"; and "[h]ad counsel raised an objection to the proposed trial date, the court was in a position to set the date within the 180-day statutory period." *Id.* at A15.

3. Respondent was subsequently tried and convicted of murder in the second degree and robbery in the first degree. Pet. App. A3. On appeal, the New York Supreme Court rejected his IAD claim, for the reasons stated by the trial court. *Id.* at A9-A10.

4. The New York Court of Appeals reversed and ordered that respondent's indictment be dismissed with prejudice under Article V(c). Pet. App. A1-A8. The court stated that "ensuring that a defendant is brought to trial within the [IAD's] speedy trial period is the responsibility of prosecutors and courts, not defendants." *Id.* at A6. In the court's view, "the IAD does not impose an obligation on defendants to alert the prosecution or the court to their IAD speedy trial rights or to object to treatment that is inconsistent within those rights." *Ibid.* "[T]o impose such an obligation," the court believed, "would be to shift the burden of compliance with the IAD from State officials," and "would diminish the statute's effectiveness and enforceability." *Id.* at A6-A7.

The court recognized that "[s]peedy trial rights guaranteed by the IAD may, of course, be waived by a defendant." Pet. App. A7. The court explained that "such waiver may be accomplished explicitly or by an affirmative request for treatment that is contrary to or inconsistent with those speedy trial rights." *Ibid.* The court held, however, that "where, as here, the defendant simply concurred in a trial date proposed by the court and accepted by the prosecution, and that date fell outside the 180-day statutory period, no waiver of his speedy trial rights was effected." *Id.* at A7-A8.

SUMMARY OF ARGUMENT

A. A defendant may waive his rights to a speedy trial under the IAD by agreeing to a trial date that comes after the expiration of the applicable IAD period. Statutory provisions are presumptively subject to waiver. *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). Congress and the adopting States passed

the IAD to allow prisoners to obtain a speedy resolution of detainers because of the deleterious effects of outstanding detainers on prisoners. See *Cuyler* v. *Adams*, 449 U.S. 433, 448-449 (1981); *United States* v. *Mauro*, 436 U.S. 340, 359-360, (1978). Because the IAD confers speedy trial rights that are primarily for the prisoner's personal benefit, the prisoner may waive his rights under the IAD.

B. A waiver of speedy trial rights under the IAD occurs when defense counsel voluntarily consents to a trial date beyond the time period specified by the IAD. As a statutory right, there is no requirement that an IAD waiver be accomplished by the defendant's intentional relinquishment of a known right. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237 (1973). Thus, a party may waive his speedy trial rights under the IAD by expressing his voluntary agreement to a trial date that would otherwise be untimely under the IAD. Cf. *Mezzanatto*, 513 U.S. at 201, 203.

In this case, respondent's counsel agreed to a trial date that fell after the expiration of Article III(a)'s 180-day limit. That conduct constitutes a voluntary waiver of respondent's speedy trial rights under the IAD.

C. The court of appeals' contrary conclusion rested on its belief that a defendant has no duty to assert his IAD speedy trial rights or to object to treatment that is inconsistent with those rights. Pet. App. A6-A8. Even assuming that to be the case, respondent here did not simply sit silently as the trial court unilaterally scheduled an untimely trial. Instead, respondent's counsel expressly consented in open court to the belated trial

date proposed by the court. The prosecutor and the trial court were entitled to rely on that action and to conclude that respondent had no legal objection to proceeding on that schedule.

The court of appeals' decision also is misguided as a matter of policy. It permits a defendant to agree to a late trial date under the IAD, and then obtain a reversal of his conviction because the trial court did precisely what the defendant agreed to. Such "sandbagging" is unfair and should not be rewarded, for it prevents trial courts and prosecutors from curing errors before they turn into fatal defects and confers an unjustified windfall on a defendant.

ARGUMENT

THE SPEEDY TRIAL PROVISIONS OF THE IAD ARE WAIVED BY THE PRISONER'S EXPRESS AGREEMENT TO A TRIAL DATE OUTSIDE THE IAD's TIME LIMITS

A. The Speedy Trial Rights Created By The IAD Are Waivable

Under Article III(a) of the IAD, a prisoner against whom a detainer has been filed has a right to be tried on the charges giving rise to the detainer within 180 days of the date the prosecutor and the court receive his demand for final disposition of the charges. There is no dispute in this case that the speedy trial rights under Article III(a) are waivable. See, *e.g.*, Pet. App. A7 ("Speedy trial rights guaranteed by the IAD may, of course, be waived."); Resp. C.A. Br. 11 ("[A]n inmate may, through his actions, waive the benefits of the IAD.").[5]

[5] The state and federal courts that have addressed the issue agree. See, *e.g.*, *Yellen* v. *Cooper*, 828 F.2d 1471, 1474-1475 (10th Cir. 1987); *Webb* v. *Keohane*, 804 F.2d 413, 414-415 (7th Cir. 1986); *Brown* v. *Wolff*, 706 F.2d 902, 907 (9th Cir. 1983); *United States* v. *Odom*, 674 F.2d 228, 230 (4th Cir.), cert. denied, 457 U.S. 1125 (1982); *United States* v. *Eaddy*, 595 F.2d 341, 344 (6th Cir. 1979); *Camp* v. *United States*, 587 F.2d 397, 399-400 (8th Cir. 1978); *Drescher* v. *Superior Court*, 218 Cal. App. 3d 1140, 1146-1149 (1990); *People* v. *Allen*, 744 P.2d 73, 75 (Colo. 1987) (en banc); *Johnson* v. *Florida*, 442 So. 2d 193, 196-197 (Fla. 1983), cert. denied, 466 U.S. 963 (1984).

The principle that a litigant may waive a right provided for his benefit applies to "a broad array of constitutional and statutory provisions." *United States* v. *Mezzanatto*, 513 U.S. 196, 200 (1995). As this Court has noted, "[t]he most basic rights of criminal defendants are * * * subject to wavier." *Peretz* v. *United States*, 501 U.S. 923, 936 (1991). Those rights include the protection again double jeopardy, *United States* v. *Broce*, 488 U.S. 563, 573 (1989); the right to a jury trial, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969); the right to have an Article III judge preside at voir dire, *Peretz*, 501 U.S. at 936-937; the right to counsel, *Faretta* v. *California*, 422 U.S. 806, 835 (1975); and the constitutional right to a speedy trial, *Barker* v. *Wingo*, 407 U.S. 514 (1972).

The fact that the IAD does not specifically address the question of waiver does not mean that IAD rights cannot be waived. See *Mezzanatto*, 513 U.S. at 200-203. (waiver of Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410's exclusion of statements made during plea discussions). "[A]bsent some affirmative indication of [the legislature's] intent to preclude waiver," this Court has "presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Id.* at 201 (citing *Evans* v. *Jeff D.*, 475 U.S. 717, 730-732 (1986)

(prevailing party in civil rights action may waive its statutory eligibility for attorney's fees)).

While the "background presumption that legal rights generally * * * are subject to waiver by voluntary agreement of the parties" may be overcome if there is "some affirmative basis for concluding that [the relevant law] depart[s] from the presumption of waivability," *Mezzanatto*, 513 U.S. at 203-204, there is no "affirmative basis" for finding that the IAD's speedy trial rights are non-waivable. Rights under the IAD are not "so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably 'discrediting the federal courts.'" *Id.* at 204 (citing 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5039, at 207-208 (1977)); see *United States* v. *Black*, 609 F.2d 1330, 1334 (9th Cir. 1979) (noting that "[t]he protections of the IAD are not founded on * * * the preservation of a fair trial"), cert. denied, 449 U.S. 847 (1980); *Yellen* v. *Cooper*, 828 F.2d 1471, 1474 (10th Cir. 1987) ("The concerns behind enactment of the IAD[] are not of the truth-seeking kind.").

In addition, nothing in the structure or the legislative history of the IAD suggests an intent to preclude waiver of the rights created by the Agreement. The central question is whether the speedy trial rights under the IAD were crafted primarily for the personal benefit of the defendant. If so, the rights may be waived. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848-849 (1986) ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried."); *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."); see also *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit."). Compare *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704-711 (1945) (right to liquidated damages under the Fair Labor Standards Act not waivable in light of public policies underlying the Act).

Waiver is appropriate here because the speedy trial right under Article III(a) was created primarily to protect defendants from the disadvantages of detainers. See *United States* v. *Eaddy*, 595 F.2d 341, 344 (6th Cir. 1979) ("[T]he rights created by the Agreement are for the benefit of the prisoner. They exist for his protection and are personal to him."). "The legislative history of the Agreement, including the comments of the Council of State Governments and the congressional Reports and debates preceding the adoption of the Agreement on behalf of the District of Columbia and the Federal Government, emphasizes that a primary purpose of the Agreement is to protect prisoners against whom detainers are outstanding." *Cuyler* v. *Adams*, 449 U.S. 433, 448-449 (1981). In particular, the legislative history evidences concern that outstanding detainers seriously disadvantage prisoners by, *inter alia*, subjecting them to more onerous conditions of incarceration, precluding their participation in desirable work assignments and activities, and creating uncertainty about the length of their sentences. *Id.* at 449 (quoting H.R. Rep. No. 1018, 91st Cong., 2d Sess. 3 (1970); S. Rep. No. 1356, 91st Cong., 2d Sess. 3 (1970); *United States* v. *Mauro*, 436 U.S. 340, 357, 359-360

(1978) (citing Council of State Governments, *Suggested State Legislation Program for 1957*, at 74 (1956)); *Carchman* v. *Nash*, 473 U.S. 716, 730 n.8 (1985) (cataloguing ill effects of detainers).

Article III(a) permits prisoners to avert those disadvantages by obtaining a prompt resolution of the charges underlying the detainer. See IAD, Art. I, 18 U.S.C. App. § 2, at 692 (purpose of Agreement is "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints"); see also 116 Cong. Rec. 38,840 (1970) (Sen. Hruska notes during debates that "at the heart of this measure is the proposition that a person should be entitled to have criminal charges pending against him determined in expeditious fashion"). Because prisoners subject to detainers are the primary intended beneficiaries of the IAD's speedy trial provisions,[6] those provisions may be waived.[7]

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[6] The prisoner is not the only beneficiary of the IAD's speedy trial provisions. By providing the prisoner with "a greater degree of certainty as to his future," the IAD also "enable[s] the prison authorities to plan more effectively for his rehabilitation and his return to society." S. Rep. No. 1356, *supra*, at 2. But the IAD reserves to the prisoner, and not to prison authorities, the decision whether to request the disposition of pending charges underlying a detainer. See *Carchman* v. *Nash*, 473 U.S. at 733. Therefore, any benefit to prison authorities is secondary to the benefit to the prisoner himself.

[7] In this respect, the IAD differs significantly from the Speedy Trial Act, 18 U.S.C. 3161 *et seq.* The legislative history of the latter Act identifies the "protection of the societal interest in speedy disposition of criminal cases" as the Act's "primary objective," and explicitly disapproves of waiver by the parties. S. Rep. No. 212, 96th Cong., 1st Sess. 29 (1979); see also *Cephas*, 937 F.2d at 819 (noting that "the purposes of the speedy trial act extend beyond those of the detainer act, and protect as well the interests of society and of the government in obtaining prompt disposition of criminal charges"). Accordingly, several courts of appeals have held that the time limits of the Speedy Trial Act cannot be waived by the defendant. See, *e.g.*, *United States* v. *Gambino*, 59 F.3d 353, 359-360 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996); *United States* v. *Saltzman*, 984 F.2d 1087, 1091 (10th Cir.), cert. denied, 508 U.S. 964 (1993); *United States* v. *Willis*, 958 F.2d 60, 62-65 (5th Cir. 1992); *United States* v. *Berberian*, 851 F.2d 236, 239 (9th Cir. 1988), cert. denied, 489 U.S. 1096 (1989); *United States* v. *Ray*, 768 F.2d 991, 998 n.11 (8th Cir. 1985); *United States* v. *Carrasquillo*, 667 F.2d 382, 388-390 (3d Cir. 1981). But see *United States* v. *Pringle*, 751 F.2d 419, 434-435 (1st Cir. 1984) (exception where waiver by defendant causes or contributes to delay); *United States* v. *Kucik*, 909 F.2d 206, 210-211 (7th Cir. 1990) (same), cert. denied, 498 U.S. 1070 (1991); *United States* v. *Keith*, 42 F.3d 234, 238 (4th Cir. 1994) (waiver upheld as long as reasons underlying it would justify a continuance under the Act). Because the reasoning of those cases is confined to the Speedy Trial Act context, they have no bearing on the issue presented here.

B. A Defendant Waives The IAD's Speedy Trial Rights When He Or His Counsel Voluntarily Takes Action That Is Inconsistent With An Assertion Of Those Rights

1. The conditions under which a right may be waived largely depend on the nature of the right itself. *United States* v. *Olano*, 507 U.S. 725, 733 (1993). For a limited class of fundamental constitutional rights, such as the right to be represented by counsel and the right to a jury trial, "the accused has the ultimate authority," and therefore the defendant must give personal and informed consent before a waiver is valid. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Wainright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring); see *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (waiver of

right to counsel defined as an "intentional relinquishment or abandonment of a known right or privilege").[8]

For other rights, however, defense counsel may make tactical decisions that result in waiver without securing or recording the defendant's personal informed consent. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237 (1973). This Court therefore has not required a "showing of conscious surrender of a known right * * * with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused." *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976); see also *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988) ("The adversary process could not function effectively if every tactical decision required client approval."). Because it is a statutory right, an attorney may waive his client's rights under the IAD without a showing that the defendant is aware of those rights.[9]

There also is no requirement that defense counsel must explicitly advert to IAD rights in order to waive them. As respondent concedes, waiver of IAD rights

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[8] Of course Congress also can expressly provide that a statutory right may not be waived without satisfying certain requirements. See *Oubre* v. *Entergy*, 522 U.S. 422, 424, 426-427 (1998) (discussing requirements for waivers under Older Workers Benefit Protection Act).

[9] The lower courts have so held. See, *e.g.*, *Yellen*, 828 F.2d at 1474; *Webb* v. *Keohane*, 804 F.2d 413, 414-415 (7th Cir. 1986); *United States* v. *Lawson*, 736 F.2d 835, 837-838 (2d Cir. 1984); *United States* v. *Odom*, 674 F.2d 228, 230 (4th Cir.), cert. denied, 457 U.S. 1125 (1982); *Black*, 609 F.2d at 1334, *Eaddy*, 595 F.2d at 344; *Camp*, 587 F.2d at 400.

occurs whenever the defendant or his counsel takes "an act expressly or impliedly inconsistent with the provisions of the IAD." Br. in Opp. 2. See, *e.g.*, *Lawson*, 736 F.2d at 840; *Odom*, 674 F.2d at 230. That conclusion comports with decisions from this Court finding a valid waiver of even constitutional rights based on defense conduct that is inconsistent with those rights, notwithstanding the absence of an explicit reference to the rights relinquished. See *Ricketts* v. *Adamson*, 483 U.S. 1, 9-12 (1987) (plea agreement that specifies that a charge will be reinstated if the defendant declines to testify at co-defendants' trial waived double jeopardy bar even though "double jeopardy" was not specifically waived by name in the plea agreement); *Insurance Corp. of Ireland* v. *Campagnie des Bauxites de Guinee*, 456 U.S. at 703 (party may waive due process right that court have personal jurisdiction over it by "express or implied consent"); *United States* v. *Gagnon*, 470 U.S. 522, 528-529 (1985) (per curiam) (defendant's failure to assert right under Fed. R. Crim. P. 43 to attend judge's conference with juror of which he was aware constitutes valid waiver of right, and trial court need not get an express "on the record" waiver from defendant); see also *North Carolina* v. *Butler*, 441 U.S. 369, 373-376 (1979) (waiver of *Miranda* rights can be inferred from "the actions and words of the person interrogated"); *Diaz* v. *United States*, 223 U.S. 442, 445 (1912) (defendant's voluntary absence from trial after trial began operates as a waiver of his right to be present).

Similarly, a party's express or implied consent to governmental action often removes any claim that the action violated the party's rights. See, *e.g.*, *Peretz*, 501 U.S. at 934-937 (party's consent to voir dire conducted by magistrate removes any legal objection under Article III and Federal Magistrates Act, Pub. L.

No. 90-578, 82 Stat. 1107); *Estelle* v. *Williams*, 425 U.S. at 512-514 (no Fourteenth Amendment violation when defendant did not object to appearing at trial in prison clothes); *Levine* v. *United States*, 362 U.S. 610, 619 (1960) (no due process violation when public was excluded from criminal contempt proceedings when defendant did not request court to open the courtroom).

2. Applying those principles, respondent waived his speedy trial rights under the IAD when his counsel agreed that trial on a date after the 180-day period would be "fine." Respondent concedes that a defendant waives his IAD rights when he acts in a manner inconsistent with the Act. Since the trial could not be held, consistent with the IAD's time limits, the conclusion is inescapable that respondent waived his IAD speedy trial rights under Article III(a).

Respondent seeks to avoid that result by arguing that his counsel's "acquiescence" to the May 1 trial date did not constitute an "express agreement" to hold the trial on that date. Br. in Opp. 1, 5-7. Instead, respondent argues, an agreement to a trial date beyond the IAD's limits constitutes an "express agreement," and thus a waiver, only if (1) defense counsel "expressly requested" that date; or (2) the delay is "to the *benefit* of the defendant." *Id.* at 3.

Although some cases interpreting the IAD have distinguished between a "request" by the defendant and an "acquiescence" by him,[10] nothing in this Court's waiver jurisprudence supports that distinction. To the contrary, this Court has indicated that "legal rights generally, * * * are subject to waiver by *voluntary*

[10] See, *e.g.*, *People* v. *Allen*, 744 P.2d 73, 76-77 (Colo. 1987) (en banc); but see *People* v. *Jones*, 495 N.W.2d 159, 161 (Mich. App. 1992).

agreement of the parties." *Mezzanatto*, 513 U.S. at 203 (emphasis added). The hallmark of a voluntary agreement, of course, is an objective manifestation of the parties' mutual assent. See Restatement (Second) of Contracts §§ 3, 22 (1981); 1 Joseph M. Perillo, *Corbin on Contracts* §§ 1.9, 4.13 (1993). Once a party has manifested his assent, it does not matter who originally proposed the term agreed to. What is important is that he consented to that term.[11]

Not only does respondent's approach distort the ordinary meaning of the term "agreement," but it would encourage misleading verbal gamesmanship by defense counsel. Under respondent's approach, the validity of counsel's waiver would turn on the precise phrasing of his agreement. If, for example, defense counsel said "I concur in the May 1 trial date," no waiver would occur, but if he said "I concur in the request for a May 1 trial date," his adoption of the request presumably would result in waiver. The result of criminal cases should not rest on such subtle semantic distinctions.[12]

Likewise without merit is respondent's contention (Br. in Opp. 3, 7) that a waiver occurs only if the delay to which defense counsel consented is shown to be for

[11] In this case, defense counsel's statement that the May 1 trial date would be "fine" was reasonably interpreted to mean that there were no barriers, legal or otherwise, with proceeding to trial on that date. See J.A. 53 (May 2, 1995, Affidavit of Defense Counsel) ("By responding that the day would be fine, [counsel] was merely indicating that there was no barrier to proceeding on that date.").

[12] The fact that the IAD requires dismissal with prejudice, see IAD Article V(c), 18 U.S.C. App. § 2, at 693-694, makes it even less likely that Congress and the adopting States intended to endorse the kind of gamesmanship respondent's approach would produce.

the defendant's benefit. Courts presume that defense counsel assert or waive the defendant's rights based on a judgment about how best to promote the defendant's interests. Tactical decisions by defense counsel thus can bind the defendant whether or not there is a showing that they actually benefit the defense. *Reed* v. *Ross*, 468 U.S. 1, 13 (1984) ("absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel"); *Jones* v. *Barnes*, 463 U.S. at 754 (judges should not second guess reasonable professional judgments made by appellate counsel). The adversary system could not otherwise function. See *Estelle* v. *Williams*, 425 U.S. at 512; *Taylor* v. *Illinois*, 484 U.S. at 417.

Accordingly, the prosecutor and trial court were entitled to infer from the statement of respondent's counsel, that a May 1 trial date would be "fine," that counsel had no legal objection to proceeding on that schedule. There would have been no reason to question counsel's judgment in agreeing to postpone trial, for, as this Court has observed, "[d]elay is not an uncommon defense tactic." *Barker* v. *Wingo*, 407 U.S. at 521.[13]

C. Policy Considerations Do Not Support The Court of Appeals' Waiver Standard

In holding that respondent's consent to the May 1 trial date did not effect a waiver under the IAD, the

[13] Respondent suggests (Br. in Opp. 6 n.3) that his counsel's "respectful acquiescence" to the proposed trial date was required by rules of "civility." But counsel may inform the trial court that a proposed course of action conflicts with his client's statutory rights without risking impoliteness. Nor is civility advanced when defense counsel agrees in open court to a particular trial date proposed by the court, and later files a motion arguing that the same trial date mandates dismissal of the indictment.

New York Court of Appeals reasoned that "it is the burden of the prosecutor and the court to comply with the IAD's speedy trial requirements." Pet. App. A8; see also *id.* at A6 ("[T]he IAD does not impose an obligation on defendants to alert the prosecution or the court to their IAD speedy trial rights or to object to treatment that is inconsistent with those rights."). It is far from clear that defense counsel should be freed from any obligation to call to a court's attention that it is on the brink of committing legal error, when a timely objection could easily permit the error to be cured. See *United States* v. *Gagnon*, 470 U.S. at 529. This is not a case, however, in which a defendant simply failed to object to a trial date that the trial court unilaterally scheduled.[14] To the contrary, the trial judge convened a hearing in open court to solicit the parties' views on

[14] The lower courts are divided on whether such failure to object to the setting of a trial date beyond the 180-day period constitutes a waiver that bars relief on direct appeal. Compare, *e.g.*, *State* v. *Schmidt*, 932 P.2d 328, 334-335 (Haw. 1997) (failure to object to trial date set beyond 180-day period waived any objection brought after the period had run); *Reid* v. *State*, 670 N.E.2d 949, 951-952 (Ind. 1996) (same), with *State* v. *Dolbeare*, 663 A.2d 85, 86-87 (N.H. 1995) (failure to object to trial date set beyond 180-day period did not waive IAD claim); *Roberson* v. *Commonwealth*, 913 S.W.2d. 310, 314-315 (Ky. 1994) (same); *Eaddy*, 595 F.2d at 343-345 (defendant did not waive his rights under Article IV(c)'s anti-shuttling provision by failing to state a preference as to his place of incarceration). As for collateral relief, the matter is settled. Under *Reed* v. *Farley*, 512 U.S. 339 (1994), relief on federal habeas corpus for an alleged violation of the speedy trial period in IAD Article IV(c) is not available where the defendant did not object to the trial date at the time it was set and suffered no prejudice. *Id.* at 341, 349-353 (plurality opinion of Ginsburg, J.); *id.* at 355-359 (Scalia, J., concurring in part, and concurring in the judgment on the broader ground that violations of IAD time periods never warrant collateral relief).

an appropriate date, and respondent's counsel affirmatively consented to the date proposed by the court. Thus, even assuming the IAD places the duty of complying with the 180-day period solely on the government and the court, a defendant nonetheless waives the IAD's protections by affirmatively agreeing to a noncomplying trial date.

The court of appeals' belief that the burden of statutory compliance falls on the court and prosecutor (Pet. App. A8) would not in any event support the distinction the court drew between delay "requested" by the defense and delay in which counsel merely "acquiesced" or "concurred." Respondent concedes that he would have waived his rights under the IAD had he *requested* a trial date beyond the 180-day period. Br. in Opp. 3. Yet if a waiver when the defendant requests the delay would not "diminish the statute's effectiveness and enforceability" (Pet. App. A7), the same is true when the defendant agrees to the delay. In either situation, the defendant has voluntarily abandoned his right to a speedy trial in accordance with the IAD by consenting to a trial period outside the 180-day period.

There is an additional fundamental reason for rejecting the court of appeals' analysis. An approach that allows a party to agree to a particular procedure and then seek reversal because the court carried out the agreement is inconsistent with basic rules of fairness and "sound considerations of judicial economy." *Thomas* v. *Arn*, 474 U.S. 140, 147 (1985). A party may not engage in "sandbagging" by "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later * * * claiming that the course followed was reversible error." *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring); cf. *City of Monterey* v. *Del Monte Dunes*,

119 S. Ct. 1624, 1636 (1999) (party that proposed "the essence of the instructions given to the jury * * * cannot now contend that the instructions did not provide an accurate statement of the law").[15]

This case illustrates the deficiencies of the court of appeals' approach. As the trial court noted, "[h]ad counsel raised an objection to the proposed trial date, the court was in a position to set the date within the 180-day statutory period." Pet. App. A15. Similarly, had respondent's counsel registered an objection at the January 9 hearing, the prosecutor could have asked the court to grant a "necessary or reasonable continuance" for "good cause shown in open court." IAD, Art. III(a), 18 U.S.C. App. § 2, at 692. Instead, when respondent's counsel consented to the trial date, its untimeliness went undetected by the court before the expiration of the 180-day period. Permitting a defendant to consent to a trial date, while reserving a timeliness objection until it is too late to cure it, is inconsistent with the defendant's "obligation to [bring his objection] to the court's attention so the trial judge will have an opportunity to remedy the situation." *Estelle* v. *Williams*, 425 U.S. at 508 n.3; *United States* v. *Gagnon*, 470 U.S. at 529; cf. *Wainwright* v. *Sykes*, 433 U.S. at 89-90 (contemporaneous objection rule permits trial court to correct error, allows government to respond accordingly, and prevents defense lawyers from "sandbagging").

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[15] We do not mean to suggest that defense counsel necessarily knew that the May 1, 1995, trial date was beyond the IAD's 180-day period. The present record does not resolve that issue, which is not, in any event, dispositive. See p. 14, *supra*. The rule respondent advocates, however, would preclude a waiver even where counsel knowingly acquiesced in a date beyond the 180-day limit.

Finally, the decision below confers an unjustified windfall on a defendant. Respondent claims no actual prejudice to the fairness of his trial (or to any other interest) and cannot claim that a failure to hold trial within the IAD's 180-day period establishes a violation of his constitutional rights. See *Reed* v. *Farley*, 512 U.S. 339, 352 (1994) (rejecting claim that IAD violation is a violation of Sixth Amendment trial rights). While the IAD "insure[s] that both prosecution and defendant may, *if they wish*, have their day in court on a prompt and timely basis," 116 Cong. Rec. at 38,840 (remarks of Sen. Hruska) (emphasis added), the IAD gives defendants "no greater opportunity to escape just convictions." Council of State Governments, *supra*, at 76-77; accord S. Rep. No. 1356, *supra*, at 2; H.R. Rep. 91-1018, *supra*, at 2. Here, the court of appeals ordered that the indictment for murder and robbery on which respondent was convicted be dismissed with prejudice on the ground that the trial date, to which respondent freely consented, fell beyond the 180-day period. Neither the text, history, nor underlying purposes of the IAD justify permitting respondent to profit from participation in an "unwitting judicial slip" (*Reed* v. *Farley*, 512 U.S. at 349 (plurality opinion)) after he specifically agreed to a trial date beyond the statutory period.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

LISA SCHIAVO BLATT
Assistant to the Solicitor General

ELIZABETH D. COLLERY
Attorney

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APPENDIX A

Article III of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, at 692-693, provides, in pertinent part:

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of the parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, com-

missioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

Article V of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, at 693-694, provides, in pertinent part:

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

Article IX of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, at 695, provides, in pertinent part:

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State—

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice.